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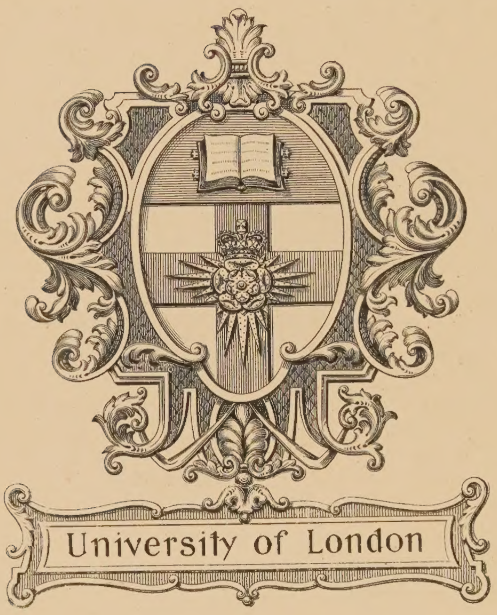
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DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

Applied. JOHN M. BROWN, LTD. *v.* BESTWICK. [1950] 2 All E.R. 338.

Applied. JOHN M. BROWN LD. *v.* BESTWICK **[1951] 1 K. B. 21**

HASKINS *v.* LEWIS.

C. A.

1930

Dec. 10, 11.

Landlord and Tenant—Recovery of Possession—House and Shop let to Tenant—Part of Premises used for Business Purposes—Remainder of House sub-let as two Dwelling-houses—Tenant no longer in Occupation of Premises as a Dwelling-house—Recovery of Possession of the whole House or of Part used for Business Purposes—Increase of Rent and Mortgage Interest (*Restrictions*) *Act*, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 2 (*ii.*); *s.* 15, *sub-s.* 3—*Rent and Mortgage Interest Restrictions Act*, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 4.

A house and shop were let to a tenant in 1900. The house consisted of two rooms in the basement, a shop and parlour on the ground floor, two rooms on the first floor and two rooms on the second floor. The tenant originally carried on a tailor's business in the shop and resided in the house with his family. Subsequently he ceased to carry on the tailor's business and his daughter carried on a drapery business on the ground floor, and his son carried on a betting business on the first floor. In 1927 the tenant moved to another house where he resided with his family; he then sub-let the two rooms in the basement to one sub-tenant as a residence, and the two rooms on the second floor to another sub-tenant as a residence. The landlord served notice to quit upon the tenant, and then commenced proceedings in the county court to recover possession of the premises. The tenant relied upon the protection given by the Rent Restriction Acts. The county court judge found as a fact that the ground floor and the first floor constituted business premises, and that the tenant had sub-let the remainder of the premises and so parted with possession of them. He accordingly held that the tenant was not entitled to the protection of the Rent Restriction Acts and gave judgment for the landlord for possession:—

Held, by the Court of Appeal (Scrutton and Romer L.JJ.; Greer L.J. dubitante), that an order could be made for the recovery by the landlord of possession of the whole of the premises, notwithstanding that the basement and second floor had been sub-let to two tenants as residences, those sub-tenants being protected by s. 5, sub-s. 5, and s. 15, sub-s. 3, of the Rent Restriction Act, 1920, and becoming tenants of the landlord.

Gidden v. *Mills* [1925] 2 K. B. 713 dissented from on this point.

APPEAL from the Divisional Court.

The defendant J. Lewis in 1900 became the tenant of No. 14 Johnson Street, Notting Hill. The house consisted of two rooms in the basement, a shop and parlour on the ground floor, two rooms on the first floor, and two rooms on the second floor. The defendant originally carried on a tailor's business in the shop and resided in the house with his family. About ten years ago one of the defendant's sons commenced to carry on a betting business on the first floor. The defendant stopped carrying on the tailor's business on the ground floor, and a drapery business was then carried on there by his daughter. In 1927 the defendant moved to another house in St. Quentin's Avenue, where he resided with his family. The defendant then sub-let the two rooms in the basement to one sub-tenant as a residence and sub-let the two rooms on the second floor to another sub-tenant as a residence.

The plaintiff, who was the landlord, served notice to quit upon the defendant, and then commenced proceedings in the West London County Court to recover possession of 14 Johnson Street on the ground that the defendant had sub-let the whole of the premises except one room, which was used solely for business purposes, and he relied upon s. 13 of the Rent, etc., Restriction Act, 1920, and s. 4 of the Rent, etc., Restriction Act, 1923. In the county court there was no dispute that both the ground floor and the first floor were used for business purposes, but the dispute was whether the son who carried on the betting business on the first floor at 14 Johnson Street lived there or with his father at St. Quentin's Avenue, the evidence on this point being conflicting.

The county court judge found as a fact that the ground floor and first floor of the premises constituted business premises and that the defendant had sub-let the remainder of the premises, and so parted with possession of them. He held that in the circumstances the defendant was no longer entitled to claim the protection of the Rent Restriction Acts, and accordingly gave judgment for the plaintiff for possession and mesne profits.

The defendant appealed to the Divisional Court, and that Court held (1) that there was no evidence that there had been any alteration of the user of the premises so as to entitle the county court judge to come to the decision at which he arrived, and the Court allowed the appeal, holding that the premises were protected as a whole under the Rent Restriction Acts.

The plaintiff appealed.

Humphrey Edmunds for the appellant. There was evidence upon which the county court judge could find that part of the premises, namely, the ground floor and first floor, were used as business premises exclusively, and that the remainder of the premises, namely, the basement and second floor, were sub-let by the respondent as dwelling-houses, and that the respondent did not use the premises as a dwelling-house, and that consequently the appellant was entitled to an order for possession. The Divisional Court were wrong in reversing the county court judge on what was a question of fact. At the material time the premises were divided into two dwelling-houses and business premises, and so far as the respondent's personal occupation was concerned all that he had was the portion of the house occupied as business premises. The policy of the Rent Restriction Acts—after s. 13 of the Act of 1920, applying the Act to business premises, had ceased to operate—was not to protect premises used merely as business premises, but only to protect a tenant who lived on the premises. It is true that if a tenant uses his dwelling-house partly for business purposes he is protected by the Act: see s. 12, sub-s. 2, proviso (ii.), but the authorities do not extend the protection any further. As the respondent, the tenant, does not occupy any portion of the premises as a dwelling-house, the appellant, the landlord, is entitled to an order for possession of the whole of the premises. If an order is made for possession of the whole of the premises and the interest of the tenant on the premises is determined the sub-tenants, to whom the basement and second floor have been sub-let as dwelling-houses, will be protected by s. 15, sub-s. 3, of the Act of 1920, and will be deemed to become tenants of the landlord on the same terms as they would have held from the tenant if the tenancy had continued. In *Gidden* v. *Mills* (1) the premises which had been let were occupied partly as a garage and partly as living rooms, and the living rooms were subsequently separated from the garage and let by the tenant to a sub-tenant as a dwelling-house, and it was held by the Divisional Court that the plaintiff, who stood in the shoes of the freeholders, was entitled to an order for possession of the garage which had been separated from the portion of the premises let as a separate dwelling-house and was being used solely for business purposes, but that the plaintiff was not entitled to an order for possession of the living rooms, as they were in possession of a tenant to whom they had been validly sub-let by the defendant, the tenant of the premises, and who was holding over and was protected by s. 5, sub-s. 1, of the Act of 1920. Greer J. there held that the fact that the defendant was not in actual possession of the premises as a dwelling-house did not prevent him from claiming the benefit of the Rent Restriction Acts, as the claim was for actual possession, and an order for possession would be executed against whoever was on the

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(1) (1930) 47 Times L. R. 5.

(1) [1925] 2 K. B. 713.

premises. That case shows that the appellant in the present case is entitled to an order for possession of the business portion of these premises, but the decision was wrong as regards the order for possession of the whole house, and ought on that point to be overruled.

Gidden v. *Mills* (1) was based upon *Prout* v. *Hunter* (2). It was there held (2) that the nature of the letting to the occupying tenant is what must be looked at in determining whether the tenant is entitled to the protection of the Acts. Bankes L.J. said that the status of the house at the time when the landlord seeks to obtain possession is what has to be considered. Scrutton L.J., after referring in his judgment to *Phillips* v. *Barnett* (3), where three dwelling-houses had been structurally altered and converted into a factory and where it was held that where the dwelling-house to which the Act originally applied was no longer existing but had been altered into something substantially different, the tenant could not claim the protection of s. 12, sub-s. 6, and the premises were outside the Act, said (4): "I think we should have come to the same conclusion if the facts had been that what had been a dwelling-house was, without structural alteration, let entirely as business premises, and the reason would have been the same, that the dwelling-house to which the Act originally applied had ceased to exist, by reason of its being altered into something wholly different—namely, business premises." In *Phillips* v. *Hallahan* (5) a landlord of premises, consisting of a shop on the ground floor with a dwelling-house above, let both portions in 1923 to a tenant, but under separate lettings, and it was held that the landlord was entitled to an order for possession of the shop, as, being let separately, it was not within the protection of the Acts. The respondent therefore is not protected as regards the portion of the premises used as business premises, and the appellant is entitled to an order for possession as regards that portion. With regard to the remainder of the premises

(1) [1925] 2 K. B. 713.
(2) [1924] 2 K. B. 736.
(3) [1922] 1 K. B. 222.
(4) [1924] 2 K. B. 743.
(5) [1925] 1 K. B. 756.

which the respondent sub-let as two dwelling-houses, the respondent has parted with possession of that portion. The policy of the Act is not to protect a person who has parted with possession of the whole of a dwelling-house and who is merely in the position of a mesne landlord. The only benefit which the respondent would obtain by remaining tenant would be by raising the rent of the sub-tenants and so to obtain additional profit from them. Sect. 5, sub-s. 1 (*h*), enables a Court to make an order for possession if the tenant, without the consent of the landlord, sub-lets the whole of the dwelling-house or sub-lets part where the remainder was already sub-let.

[GREER L.J. Do you want an order to turn the sub-tenants out of possession? Under an order for possession the bailiff turns every one out who is on the premises.]

The provision in s. 15, sub-s. 3, that where the interest of a tenant of a dwelling-house is determined, as the result of an order or judgment for possession or ejectment, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall be deemed to become the tenant of the landlord, shows that an order for the recovery of possession of the whole of the premises is contemplated by the Act. Further, s. 5, sub-s. 5, provides that " an order or judgment against a tenant for the recovery of possession of any dwelling-house or ejectment therefrom under this section shall not affect the right of any sub-tenant to whom the premises or any part thereof have been lawfully sublet . . . . to retain possession . . . . or be in any way operative against any such sub-tenant." If an order is made for possession of the whole house the appellant will be in possession of part of the premises by means of the sub-tenants. Until an order is made for possession of the whole house the appellant cannot collect rent from the sub-tenants. In *West Wales Joint Board for the Mentally Defective* v. *Evans* (1) a tenant sub-let the whole of the premises and was not in occupation of any part thereof himself, and the Divisional Court, following *Gidden* v. *Mills* (2), held that no order for possession could be made against the tenant. That case was wrongly decided and ought to be overruled. The appellant is entitled in the present case to an order for possession of the whole of the premises.

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(1) (1928) 139 L. T. 382; 44 Times L. R. 565.

(2) [1925] 2 K. B. 713.

Doughty K.C. and *Salter Nichols* (*J. Single* with them) for the respondent. The county court judge was wrong in holding that the ground floor and first floor had become business premises and therefore had ceased to be within the protection of the Rent Restriction Acts. The whole house had been let to the tenant as a dwelling-house and there was no evidence that the character of the ground floor and the first floor had been changed. Sect. 12, sub-s. 6, of the Act of 1920 provides that "where this Act has become applicable to any dwelling-house . . . . it shall continue to apply thereto whether or not the dwelling-house continues to be one to which this Act applies." That may be shortly stated as once a dwelling-house within the Act always within the Act. It has been said that the section has been minimized by various decisions, but the section cannot be repealed by the Courts, and the section applies to the present case unless it comes within one of the minimizing decisions. In *Phillips* v. *Barnett* (1), where there was a structural reconstruction of the premises let, it was held that they had become substantially new premises which were outside the Act, but the premises in this case are structurally in the same condition as when let. In *Williams* v. *Perry* (2) premises which had previously been occupied partly as business premises and partly as a dwelling-house were let solely as business premises and therefore were not within the protection of the Act; that case, however, does not apply here. Greer J. pointed out in *Phillips* v. *Hallahan* (3) that if premises which were a dwelling-house to which the Act applied were let as business premises for a period the Act would not apply to them, but that if they again became a dwelling-house the Act would again apply to them. When a house has been let as a dwelling-house a change in its user will not prevent

(1) [1922] 1 K. B. 222.
(2) [1924] 1 K. B. 936.
(3) [1925] 1 K. B. 756, 760.

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it from being a dwelling-house within the protection of the Act. The facts in *Hyman* v. *Steward* (1) were very similar to those in the present case, and on those facts it was held that there had been no change of user. The county court judge could not find here that the premises were used solely as business premises and not as a dwelling-house. Even if part of the house has been severed and used as business premises so that the appellant can recover possession of that part, that will not enable an order of possession to be made as regards the remainder of the house which is used as a dwelling-house. As between the landlord and tenant there was a letting of one dwelling-house including the basement and top floor, and it remains one dwelling-house, although as between the tenant and the two sub-tenants the basement and top floor are two dwelling-houses. The respondent does not come within s. 5, sub-s. 1 (*h*), because even if he has sub-let part of the house he has not sub-let the remainder, although he may have lost it. In *Prout* v. *Hunter* (2) the house was taken out of the Act by being let furnished by the tenant, a totally different set of facts from those in the present case. In *Gidden* v. *Mills* (3) there was a severance of the garage from the living room above so that they were quite separate and distinct, and the structural alterations necessary to make them so were made by the defendant himself. Stress was laid on that fact in the argument for the plaintiff. There must be a physical alteration of the house before the landlord is entitled to say to the tenant that the status of the premises has been altered. *Prout* v. *Hunter* (2) was decided under proviso (i.) to sub-s. 2 of s. 12 of the Act of 1920, which provides that the " Act shall not . . . . apply to a dwelling-house bona fide let at a rent which includes payments in respect of . . . . use of furniture." Proviso (ii.), which applies to the present case, is framed in quite different terms, and provides that " the application of this Act to any house or part of a house shall not be excluded by reason only that part of the premises is used as a shop or

(1) [1925] 2 K. B. 702.
(2) [1924] 2 K. B. 736.
(3) [1925] 2 K. B. 713.

office or for business, trade, or professional purposes." The fact that the tenant has sub-let part of the premises and is not in physical occupation of any part thereof, is not a ground for making an order for possession: *West Wales Joint Board for the Mentally Defective* v. *Evans.* (1)

SCRUTTON L.J. This case, like all cases in my experience under the Rent Restriction Acts, is of a most bewildering character. The reason for that bewilderment comes, I think, from this, that when the Acts were drafted—and I think this applies practically to all the Acts that have so far been passed —those who drafted them and those who passed them had not made up their minds what was the nature of the privilege they were conferring on the tenant. One view to be taken was that the tenant was to be given something in the nature of property which he could pass on to other people; another view was that he was not being given a property but a personal privilege which he could not pass on to other people. The construction of the Acts by the Courts is made difficult by the fact that when temporary difficulties, difficulties which only raise some small point, have been called to the attention of those framing amending Acts, clauses have been put in the amending Acts to meet those difficulties without considering whether they fit into one theory or the other. The clause about the term "tenant" including a member of the tenant's family residing in the house on the death of the tenant intestate is a very good instance, and the clause about the term "tenant" including the widow of a tenant dying intestate is another. The Acts have been passed without those framing them having any clear idea whether they were conferring property on the tenant or whether they were conferring a privilege of personal occupation, and the Courts have very slowly—and I do not think that they have finished yet—been trying to frame a consistent theory of what must happen. To begin with, in *Keeves* v. *Dean* (2) the Court had to face the question whether a statutory tenant could assign his right, and decided

(1) 139 L. T. 382; 44 Times L. R. 565.

(2) [1924] 1 K. B. 685.

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that he could not; but the Court expressly reserved the question whether he could sub-let. In *Roe* v. *Russell* (1) the Court had to face the question whether a statutory tenant could sub-let part of the premises, the Act of 1923 having in the meanwhile said that if he sub-let the whole of the premises he lost whatever rights he had in the tenancy. The only reason why para. (*h*) of sub-s. 1 of s. 5, which raises the question of sub-letting the whole of the premises, was not referred to in *Keeves* v. *Dean* (2) was the very good reason that it was not in force at the time when the facts which gave rise to *Keeves* v. *Dean* (2) occurred. That is the answer to the question in the text-books why para. (*h*) was not referred to in *Keeves* v. *Dean.* (2) It was not referred to because it did not apply to the facts.

We now come to a case where it is necessary in more detail to work out some of the consequences of those two principles. The facts in this case are these: A Mr. Lewis, with a family, lived in this particular house. Mr. Lewis originally had a tailor's shop on the ground floor, and he had been living in the house for nearly thirty years. About ten years ago one of his sons started a betting business on the first floor, and after three years that son gave way to another son who, at the time this case came on, had been carrying on the betting business on the first floor for seven years. In 1927 the Lewis family, because of improved circumstances or for other reasons, moved to another house, where Mr. Lewis and his family resided. I do not say that as deciding a particular question which is coming. What was left then at the house which is the subject-matter of this action? The father had apparently ceased carrying on his tailor's business on the ground floor, and his daughter instead carried on a drapery business. It is not clear on what terms she was there; the evidence is that she carried on the business, but whether she paid any rent, or whether she was a tenant at will, or whether the father had any interest in the business, is left quite obscure; but at any rate the ground floor was used entirely for business purposes. On the first floor the betting business was

(1) [1928] 2 K. B. 117.

(2) [1924] 1 K. B. 685.

was still being carried on; there was a large room which would accommodate about twenty or thirty people at a time, who used to come there with the intention of betting and who used to make their bets and talk about them there and carry on that particular form of industry. In addition there was a small room which is spoken of by one of the witnesses as a small office, but which is spoken of by the defendant's son as the place where he slept. Two other tenancies were apparently then created by Mr. Lewis, a residential tenancy in the basement to one sub-tenant, and a residential tenancy in the attic to another sub-tenant. The position therefore is this: The house was originally let to the tenant as a dwelling-house with a shop, and the tenant had ceased to reside there at all, and two of the floors were being used purely as business premises; the landlord, thereupon, sought to terminate the contractual tenancy which had existed for thirty years and which could be terminated by notice to quit, and sought to resist the attempt of the tenant to stay on the ground that he was protected by the Rent Restriction Act.

The first question to be decided is one of fact which, if decided in one way, would render all the rest of the argument unnecessary. I am bound to say it is a great temptation to adopt that course and decide the case in that way. It is, however, very important continually to bear in mind in these appeals that the county court judge is the judge of fact, and there is no appeal from a county court judge's finding of fact if there is any evidence on which he could come to that finding of fact. The argument on behalf of the defendant is that the county court judge has found, or must have found, that the first floor was purely used for business purposes, and it is said that there is no evidence on which a reasonable judge could come to that conclusion. The defendant's son who carries on the betting business there says in his evidence that he has a bed in the small office in which he sleeps, which if true would be sufficient to make that room residential, and he supports that evidence by saying: "When I go to my father's house I sleep in the sitting-room, so I may as well sleep in an office as in a sitting-room." On the other hand the plaintiff and his witnesses say that on two occasions certainly they have been there and have seen no bed, and they speak of this small room at the back of the large room as a small office. The county court judge has seen those witnesses and he has made up his mind which he believes, and apparently he must have disbelieved the defendant's son when he says that he sleeps there and that there is a bed in the office. If he disbelieves the defendant's son, is it possible, having regard to the fact that two witnesses on behalf of the plaintiff say that they have seen no bed there, and having regard to the fact that the large room is admittedly used as a large room for people to come and bet and that the small room is spoken of as a small office, for us to disturb the finding of the county court judge that the first floor is used exclusively for business purposes? I quite agree that the evidence is slight, but it is of great importance to the general working of this Court that this Court or the Divisional Court should not interfere with the findings of fact of a county court judge unless there is clearly no evidence upon which he could come to such findings. It will enormously increase the number of appeals and the work of the Court if there is to be continual inquiry into exactly how much evidence there was, and whether it was enough to justify a county court judge who saw the witnesses—and this Court does not—in coming to a finding of fact. I therefore have the courage to resist the temptation that has been suggested and to continue this case on the finding that the first two floors are now used solely for business purposes.

It is said, if that is so, the sub-tenants are residing in the other parts of the original dwelling-house, and that there is no clause in the Rent Restriction Acts—neither in s. 5 of the Act of 1920, nor in s. 4 of the 1923 Act—which entitles the county court judge to make an order for possession when those are the facts. I think that is a misunderstanding of the position under s. 4 or s. 5. When there is a contractual tenancy which has never been terminated, the first thing to do to terminate it is to give the contractual notice to quit. If then the tenant does not comply with that notice and claims to hold on by virtue of the Rent Restriction Act he must show that at the date when the contractual tenancy terminates the premises are within the Rent Restriction Act. If at the time when the contractual tenancy terminates two floors of the building are used as business premises and separately occupied from the rest of the building, it is quite clear that the provisions of the Act do not apply to those two floors. They are business premises and the Act does not apply to them. On the form of the pleadings a difficulty is raised here, because for some reason which I do not understand, and which I do not think Mr. Edmunds understands either, in the original pleading the plaintiff only asks for one room to be treated as outside the Act, and that one room he does not particularize, but states that he will particularize it at the trial, and Mr. Edmunds tells us that at the time the plaintiff was referring to the large room which was used for betting. But the argument before the county court judge seems to have proceeded entirely on the footing that the four rooms—namely, the two rooms on the ground floor and the two rooms on the first floor—were used as business premises. I treat the case as I gather it was treated at the trial, namely, that those two floors, if it was found that no one resided in them, were used as business premises. So we have arrived at this position, that, at any rate, the landlord is entitled to an order for possession of the two floors used for business purposes.

Then the next step, in my view—I am stating this in a little detail, because it is a difficult question, and other minds might take different views of the way in which the same results should be arrived at—is as to the position of the two dwelling-houses, the basement and the attic, which are occupied by sub-tenants. One thing is quite certain, the original tenant is not residing in those floors; his sub-tenants are residing there. The consequence is that you have this position, that the original tenant is not occupying any part of the original tenancy, the original dwelling-house, so as to make him a tenant under the Act; he is not occupying the ground floor and the first floor as a residence, he is occupying them for business purposes; he is not occupying the attic and the basement as a residence, those portions of the house are being occupied by the sub-tenants, he is therefore not in personal occupation of any dwelling-house. That being so, he appears to me to come within the fundamental principle of the Act that it is to protect a resident in a dwelling-house, not to protect a person who is not a resident in a dwelling-house, but is making money by subletting it. That, I understand, is the principle which Swift J. intended to lay down in *Hicks* v. *Scarsdale Brewery Co.* (1) The result is, therefore, in my view, that for those reasons the landlord is entitled to say that the whole of the tenant's title to these premises has gone. I think that can be done by making an order for possession, and if it is said that an order for possession will enable the bailiff to turn out the sub-tenants, I think the answer is that the operation of s. 15, sub-s. 3, of the Act of 1920 shows that that result cannot happen. That sub-section is this: "Where the interest of a tenant of a dwelling-house to which this Act applies is determined, either as the result of an order or judgment for possession or ejectment, or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sublet shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued." There is a very similar provision, except that it does not contain the statement about being deemed to be the tenant of the landlord, in sub-s. 5 of s. 5 of the Act of 1920 but which is now s. 4 of the Act of 1923, which provides that "An order or judgment against a tenant for the recovery of possession of any dwelling-house or ejectment therefrom under this section shall not affect the right of any sub-tenant to whom the premises or any part thereof have been lawfully sublet before proceedings for recovery of possession or ejectment were commenced, to retain possession under this section, or be in any way operative against any such sub-tenant." The consequence is that

(1) [1924] W. N. 189.

I think an order for recovery of possession of the whole premises can be made in favour of the landlord against the tenant which will result in determining the tenant's interest in the whole of the dwelling-house, and that any suggestion that the order for possession will entitle the bailiff to turn the sub-tenants out of the part of the premises they occupy is met by the provision that as they are tenants of the landlord under the Act, and not tenants of the original tenant, by reason of s. 15, sub-s. 3, the bailiff will not be able to have such power. In my view, therefore, the learned county court judge came to the right conclusion.

I have not dealt in detail with the numerous cases to which we have been referred, because in my view there is nothing in them inconsistent with the result I have arrived at, except that possibly I think an order might have been made in the case decided by my brother Greer, *Gidden* v. *Mills* (1), for the recovery of possession of the whole premises on the lines I have suggested, instead of, as was decided in that case, only an order for possession of a part of the premises used as a garage.

For these reasons in my opinion the appeal must be allowed and the judgment of the county court judge restored, with costs here and below.

GREER L.J. So far as the substance of the order which Scrutton L.J. has proposed should be the order of this Court upon this appeal, I am in agreement with him. There is a purely academic question whether the order ought to be an order for the recovery of possession of the two floors which are used as business premises, or an order for recovery of possession of the whole of the premises. In either event the order will not affect the rights of the sub-tenants who are in possession of the top floor and the basement and are protected by the terms of the Act.

As I view this case it turns on these considerations. Since the decision of this Court in *Prout* v. *Hunter* (2) the law is that something that the tenant has done, and with which the landlord has had nothing to do, may alter the status of

(1) [1925] 2 K. B. 713.

(2) [1924] 2 K. B. 736.

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the premises so as to take them out of the protection of the Act. It seems to me that it follows from that that if the whole of the premises were let by the tenant as business premises he would have so altered the status of the premises that the Act did not apply to them. Whether by reason of another provision of the Act it would again apply to the premises if they afterwards again became a dwelling-house, it is unnecessary to decide. At any rate the tenant in possession may alter the status of the premises so as to deprive the occupier for the time being of the benefit of the provisions of the Act with which we are dealing. I think he may do that not merely as to the whole of the premises but also as to a distinct and defined part of the premises, whether that part is definable by physical alteration or only definable by evidence as the portion of the premises which is taken out of the Act as being used for purposes other than those covered by the Act of Parliament.

When the defendant, having let the upper portion of the premises to one tenant and the basement to another tenant, went out of possession himself of the whole of the house, and used the ground floor and the first floor entirely for business purposes and, as the county court judge has found, not for residential purposes, he, in my judgment, changed the status of the two floors from being part of a dwelling-house, that part being used for business purposes, into a separate dwelling-house used entirely for business purposes, and in respect of which no protection is given by the Act which was in operation at the relevant time. That being so, what is the position of the tenant? In my judgment the tenant is in the position of a man whose contractual tenancy can be determined by notice, and if that notice is given his contractual tenancy comes to an end, and there is nothing in the provisions of the Act that will protect him and enable him to say that he is a statutory tenant of any portion of the premises.

The difficulty that I felt in *Gidden* v. *Mills* (1) with regard to the question whether an order can be made for possession of the whole of the premises I still feel, because whether the action in the county court is an action for ejectment under s. 59, or an action for possession under s. 138 of the County Courts Act, 1888, it is in my opinion an action claiming the right to be put into physical possession of the premises, and the warrant which is provided for under the Statutory Rules of the County Court is a warrant to the officer of the Court to put the plaintiff into possession of the premises in question. That means, surely, to put him into physical possession of the whole of those premises. If it comes to the knowledge of the Court that part of the premises have been sub-let to persons who are entitled to say that under the Rent Restriction Act they are entitled to remain in possession, then the judgment for possession cannot be executed, because it is a judgment for possession of the whole of the premises, and the official of the Court cannot give possession of the whole of the premises. But whether that be right or not, it was the view I took in *Gidden* v. *Mills* (1), and a view of which I still feel the force. But it is an academic question, because whether the judgment ought to be one for possession of the whole of the premises, when the order cannot be effectively carried out, inasmuch as third parties have rights under the statute, or whether it is a judgment for possession of that part of the premises with which the rights of third parties are not concerned, does not matter, since in any event the effect of the judgment is that the landlord can take possession of the part of the premises which are used for business purposes, and that he cannot take possession of the other part of the premises which have been lawfully sub-let. Whether the rights of the sub-tenants have to be considered before judgment is given for possession, or whether the sub-tenants' rights have only to be considered after the warrant for possession is put into the hands of the officer of the Court is a matter of no consequence, having regard to the fact that the sub-tenants are in fact protected in either case. If this case depended solely on my judgment I should have confined the order to an order for possession of the ground floor and the first floor, but inasmuch as my

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(1) [1925] 2 K. B. 713.

(1) [1925] 2 K. B. 713.

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brothers think differently and agree with the view of Swift J., who is a very experienced judge in these matters, I shall have considerable hesitation after this in giving effect to the view which otherwise would have commended itself to my judgment.

Romer L.J. I agree that this appeal must be allowed. Assuming, as for the reasons given by Scrutton L.J. we are bound to do, that the finding of fact of the county court judge that the ground floor and first floor are being used solely for business purposes was correct, it follows that the only part of the premises originally demised of which the defendant is now in possession is occupied by him solely for business purposes. It has frequently been pointed out in the Courts, and it has been pointed out once more by Scrutton L.J. in the judgment that he has just given, that the principal object of the Rent Restriction Acts was to protect a person residing in a dwelling-house from being turned out of his home. Where, therefore, when the contractual tenancy comes to an end, the tenant is not in physical possession of any part of the premises, there is nothing in the Act which enables him to resist the claim of his landlord to possession, whether he has gone out without sub-letting the premises or whether he has sub-let the premises as a whole. Where he has sub-let the premises as a whole I think that he has ceased thereby to be entitled to the protection otherwise afforded him by the Act, and I think this was so even before the introduction by the Act of 1923 of para. (*h*) to sub-s. 1 of s. 5 of the earlier Act, a paragraph which I think was introduced by the Act of 1923 really for the purpose of quieting any doubts that may previously have existed on the subject. If it be right, as I think it is, to say that a tenant, who has given up possession of the whole of the premises, or who has sub-let the whole of the premises, is not entitled to the protection of the Act when his contractual tenancy comes to an end, it is equally true that where the contractual tenancy has come to an end and the tenant has given up possession of the residential portion of the premises and only remains in possession of part of the premises used solely for business purposes he is outside the protection afforded by the Act. For these reasons it appears to me that the learned county court judge was right in holding, as in effect he did, that in the circumstances the defendant was not entitled to any protection afforded by the Act, and that the plaintiff, as against him at any rate, was entitled to an order for possession.

As regards the question whether an order for possession in those circumstances could be made against sub-tenants who, of course, are entitled to the protection afforded to them by the Act, I recognize to the full the difficulty that has been pointed out in the earlier case of *Gidden* v. *Mills*. (1) On the other hand, it is to be observed that the Act in terms contemplates that notwithstanding the existence of sub-tenancies and the possession of sub-tenants, an order may be made against a tenant, the original tenant, for possession. That is contemplated by s. 5, sub-s. 5, by s. 15, sub-s. 3, and indeed by s. 5, sub-s. 1, para. (*h*). There is this further, I think, to be observed. Sect. 15, sub-s. 3, provides that in certain cases the relationship of landlord and tenant shall subsist between a landlord and a sub-tenant where an order for possession has been made against the tenant, and in the present case, if no order be made in favour of the landlord, giving him possession of the whole of the premises, I foresee great difficulty in the landlord hereafter saying that the relationship of landlord and tenant has been created between him and the sub-tenant by virtue of s. 15, sub-s. 3. Of course making an order for possession of property where some one else is in possession other than the defendant in the ejectment action, is in a way anomalous, but that is an anomaly which I think has to be faced. But even if we make an order for possession of part only of the premises we are creating an anomaly, because it is an anomaly to give to a landlord, in an action for possession against his tenant, possession of only part of the premises.

I only want to add this. Speaking entirely for myself, I am not at present satisfied that where a tenant grants a

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(1) [1925] 2 K. B. 713.

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sub-lease of part of demised premises, there is then, as between himself and his own landlord, a substitution of two dwelling-houses for one. That by the granting of the sub-lease he does create, as between himself and his sub-tenant, a new dwelling-house, must of course be admitted; but I am by no means satisfied, as I have said, that he creates a new dwelling-house of that part of the premises which he has sub-let as between himself and his landlord. Where, therefore, the tenant sub-lets the business part of the premises and retains possession of the rest of the property for his own residential purposes, I should desire to give the matter further consideration before coming to the conclusion that the landlord became entitled to possession of that part of the premises which is used for business purposes only. However, in the circumstances, that question does not fall to be determined.

Appeal allowed.

Solicitors for appellant: *Edward Mackie & Co.*

Solicitors for respondent: *Schultess-Young, Warren & Bird.*

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SPILLERS, LIMITED *v.* CARDIFF (BOROUGH) ASSESSMENT COMMITTEE AND PRITCHARD (Revenue Officer for Cardiff Assessment Area).

PIERCE (Revenue Officer for Wirral Assessment Area) *v.* WIRRAL ASSESSMENT COMMITTEE AND THE RATING AUTHORITY FOR THE ELLESMERE PORT AND WHITBY URBAN DISTRICT COUNCIL RATING AREA AND SPILLERS, LIMITED.

PINSENT (Revenue Officer for Plymouth Assessment Area) *v.* PLYMOUTH ASSESSMENT COMMITTEE AND THE OCTAGON BREWERY COMPANY, LIMITED.

BLUNT (Revenue Officer for West Derby Assessment Area) *v.* WEST DERBY ASSESSMENT COMMITTEE AND TATE AND LYLE, LIMITED.

SAME *v.* SAME.

Rates—Derating—Industrial Hereditament—Contiguous Premises—Rating and Valuation (Apportionment) Act, 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 3, *sub-ss.* 1, 2, 3.

By the Rating and Valuation (Apportionment) Act, 1928, s. 3, sub-s. 1: " In this Act the expression 'industrial hereditament' means a hereditament . . . . occupied and used . . . . as a factory or workshop."

Sub-s. 2: " For the purposes of this Act any place used by the occupier for the housing or maintenance of his road vehicles or as stables shall, notwithstanding that it is situate within the close, curtilage or precincts forming a factory or workshop and used in connection therewith, be deemed not to form part of the factory or workshop. . . ."

Sub-s. 3: " Where two or more properties within the same curtilage, or contiguous to one another, are in the same occupation and, though treated as two or more hereditaments for the purposes of rating and valuation by reason of being situate in different parishes or of having been valued at different times or for any other reason, are used as parts of a single . . . . factory, or workshop, then, for the purposes of determining whether the several hereditaments are industrial hereditaments they shall be treated as if they formed parts of a single hereditament comprising all such hereditaments."

Sect. 4, sub-s. 2 (*b*): " Where . . . . the part of the net annual value of a hereditament attributable to purposes other than industrial purposes

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does not exceed ten per cent. of the part thereof attributable to industrial purposes, the hereditament shall be treated as if it were occupied and used wholly for industrial purposes; . . . ." :—

Held, that the word "contiguous" must be construed in its ordinary and proper sense as meaning "touching," and not in its loose sense as meaning "neighbouring."

In five cases properties in the same occupation as the main industrial hereditaments were alleged to be part of the main industrial hereditament as being contiguous thereto. The distance in a direct line between the two properties sought to be treated as part of a single hereditament varied from 20 yards to 60 yards. In one case the properties were only separated by a public thoroughfare, but in that case the property sought to be added was used as a stable. In the other four cases the properties were separated by other properties in different ownership:—

Held, that the two properties in four of the cases were not contiguous to each other and therefore could not be treated as parts of a single hereditament within s. 3, sub-s. 3, of the Act of 1928, and in the fifth case, that inasmuch as the property sought to be added was used as a stable, and therefore, under s. 3, sub-s. 2, was to be deemed not to form part of the factory or workshop, it could not therefore be one of the properties which "are used as parts of a single . . . . factory" within s. 3, sub-s. 3.

SPILLERS, LIMITED *v.* CARDIFF (BOROUGH) ASSESSMENT COMMITTEE AND H. A. PRITCHARD (REVENUE OFFICER FOR THE CARDIFF ASSESSMENT AREA).

1. SPECIAL CASE stated by the Recorder of the City of Cardiff under and in pursuance of s. 31, sub-s. 5, of the Revenue and Valuation Act, 1925.

2. At the Court of Quarter Sessions held in and for the City of Cardiff upon January 15, 1930, Messrs. Spillers, Ld., the appellants above named, appealed against the decision of the Cardiff Borough Assessment Committee given on September 27, 1929, to exclude from the Special List for the rating area of the borough of Cardiff as an industrial hereditament the hereditament in the valuation list described as follows:—

Occupiers . .	Spillers, Ld.
Premises . .	Offices, 240/243, Bute Street.
Assessment No. .	B. 176/2782.
Nett annual value	538*l.*
Rateable value .	538*l.*

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3. The following facts were admitted or proved before the Recorder :—

(*a*) The respondent Herbert Alfred Pritchard was the Revenue Officer for the borough of Cardiff Assessment Area.

(*b*) The respondent committee was the Assessment Committee of the City of Cardiff Assessment Area.

(*c*) The said hereditament consisted of offices and buildings in Bute Street in the occupation of the appellants.

(*d*) The said offices and buildings (a plan of which was annexed to and formed part of the case) comprised a three storied stone built basement building, part with a flat roof and part with a slate pitched roof, a portion of the basement and front ground floor being occupied as a post office.

The frontage to Bute Street, excluding the post office, was about 87 feet; the frontage to a back lane 111 feet, and the depth of the building was about 90 feet. The only entrance to the offices was on the south side of the block.

(*e*) The said hereditament was occupied and used by the appellants as set out in the schedule marked "B," which was annexed to and also formed part of the case.

(*f*) The appellants owned and carried on a large undertaking as millers and bakers in Cardiff, and in addition to the said hereditament, the subject of this appeal, they owned the premises marked in the plan C, which was annexed to and formed part of the case. The said hereditament and such premises were thereon described and coloured as follows and their assessment numbers were as hereinafter stated:—

E. General offices (the subject of this appeal)		Ass. No.	176
A. East and West Mills	Blue	,,	172-173
C. New Mill and Old Bakery	,,	,,	175
D. Engineering shops	,,	,,	174
B. Castle Mill Warehouse	,,	,,	171
F. Hibberts Warehouse	Pink	,,	179
G. Grain Mill	,,	,,	177
H. Atlantic Mills Bakery and silos	Brown	,,	106
J. Cardiff and Channel Mills and silos	Grey	,,	169

The appellants carried on their business upon each of the said sets of premises, and the said premises together formed the appellants' undertaking. The final production of the articles manufactured by them was the result of processes or treatment which had taken place in several of the said premises, including G, H or J. Except that there were mill manager's offices respectively in premises A and in premises J, the whole of the offices and staff pertaining to the appellants' whole undertaking in Cardiff were grouped together in the said hereditament the subject of this appeal.

(*g*) The distance in an air line from the north-eastern wall of the said hereditament to the western wall of the premises referred to as block C, was 47 yards, but there was no communication or access between the said hereditament and the said block in a direct line owing to the interposition of the Great Western Railway's double line. The nearest way was by a road which ran north-west from near the "S" in Bute Street on the plan hereto annexed, passed under the railway and then joined Collingdon Road. The entrances to block C were on its north-eastern side. North of block C and south of the said road there were several warehouses or similar buildings not in the occupation of the appellants. The said road was a private road vested in the Great Western Railway Company, but which was commonly used by the appellants, who had never been refused permission to use it. At a point corresponding with E in Bute of Bute Street on the said plan there was a flight of steps, and according to the plan it was about 150 yards from the said hereditament to block C, but using the private road all the way it was about 250 yards. The distance otherwise than by the said private road—namely, further to the north, via Bute Street, and the Approach Road to mills as marked on the plan was considerably further and a matter of five minutes' walk. From the said hereditament to block J was about 1000 yards, and to block H about 800 yards.

(*h*) The offices in the said hereditament were connected by private telephones with all the premises forming the appellants' undertaking.

(*j*) At the date of the hearing of the appeal the premises hereinbefore referred to blocks A, B, C, D, F and J were entered as wholly industrial in the Special List. Block G was at the said date entered in the Special List as wholly industrial, but the Revenue Officer had appealed against the Assessment Committee's decision that it was an industrial hereditament and such appeal had not been heard at the said date. Block H was at the said date entered in the Special List as wholly industrial, but the Revenue Officer had appealed against the Assessment Committee's decision that it was wholly industrial and such appeal had not been heard at the said date.

(*k*) The whole of the business carried on by the appellants in the various buildings herein referred to was recognized to be one undertaking.

(*l*) The said hereditament related to the appellants' undertaking, but no evidence was given whether or no it was registered under the Factory and Workshops Acts, 1901–20.

4. On the part of the appellants it was contended :—

(1.) That the decision of the Assessment Committee was unfair and incorrect and not in accordance with the facts presented to them at the hearing of the appellants' objection.

(2.) That the hereditament herein referred to was and should have been treated as contiguous to and part of and belonging to their mills and other premises which had been regarded and assessed as industrial hereditaments.

(3.) That the decision of the Assessment Committee was wrong in law.

(4.) That the provisions of the Rating and Valuation (Apportionment) Act, 1928, in particular s. 3, sub-ss. 1 and 3, and s. 4 had been wrongly interpreted and/or applied to the appellants' hereditaments herein referred to.

5. On the part of the respondent Revenue Officer it was contended :—

(1.) That the said hereditament was not an industrial hereditament within the meaning of s. 3 of the Rating and Valuation (Apportionment) Act, 1928, by reason of the fact that it was primarily occupied and used for the

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purpose of offices which was not the purpose of a factory or workshop.

(2.) That the said hereditament was not contiguous to the appellants' mills or any of them or within the same curtilage within the meaning of s. 3, sub-s. 3, of the said Act.

(3.) That on the true construction of s. 3, sub-s. 3, of the Act of 1928 the said hereditament was not contiguous to the blocks G, H, and J, but it might be contiguous to the blue portion on plan C, which comprised blocks C, D, A and B, and that the said hereditament and the blocks C, D, A and B were not used as parts of a single factory, but the parts of the single factory here in question were the whole of the appellants' undertaking, consisting of all the blocks referred to in para. 2 (*e*) hereof, which blocks were not all contiguous to one another and therefore none of them ought to be deemed contiguous for the purpose of determining whether they were industrial hereditaments.

6. On the part of the respondent Assessment Committee it was contended :—

(1.) That the decision of the Assessment Committee was both fair and correct and in accordance with the facts presented to them at the hearing of the appellants' objection referred to in para. 2 of the appellants' statement of case.

(2.) That the hereditament referred to in the appellants' statement of case was not contiguous to the appellants' mills and/or other premises.

(3.) That the decision of the Assessment Committee was right in law.

(4.) That the provisions of the Rating and Valuation (Apportionment) Act, 1928, in particular, s. 3, sub-ss. 1 and 3, and s. 4 had been rightly interpreted and/or applied to the said hereditament.

(5.) That the onus in relation to this appeal lay on the appellants.

7. On the facts as found and admitted the Recorder was of opinion that as the offices comprised in the said hereditament were a necessary adjunct to the mills without which the said mills could not be worked, the said hereditament was

contiguous to the said mills within the meaning of s. 3, sub-s. 3, of the Rating and Valuation (Apportionment) Act, 1928, and accordingly allowed the appeal, ordering the respondent Revenue Officer to pay to the appellants the qualifying fee of Mr. Peiser, one of the appellants' witnesses.

8. The question for the opinion of the Court was whether upon the above facts the Recorder came to a correct determination and decision in point of law.

The Revenue Officer appealed.

Sir William Jowitt A.-G., *Wilfrid Lewis* and *Colin H. Pearson* for the Revenue Officer.

Comyns Carr K.C. and *W. C. Howe* for Spillers, Ld.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

PIERCE (REVENUE OFFICER FOR WIRRAL ASSESSMENT AREA) *v.* ASSESSMENT COMMITTEE FOR THE WIRRAL ASSESSMENT AREA AND THE RATING AUTHORITY FOR THE ELLESMERE PORT AND WHITBY URBAN DISTRICT COUNCIL RATING AREA AND MESSRS. SPILLERS, LIMITED.

SPECIAL CASE stated in accordance with the provisions of sub-s. 5 of s. 31 of the Rating and Valuation Act, 1925.

1. At the Court of Quarter Sessions for the county of Cheshire sitting at Chester on June 18, 1930, the Revenue Officer for the Wirral Assessment Area, the appellant above named, appealed against the decision of the Wirral Assessment Committee to include as an industrial hereditament, in the Special List for the rating area of Ellesmere Port and Whitby Urban District Council, the hereditament therein described as follows:—

Occupier . .	Messrs. Spillers, Ld. (Messrs. F. A. Frost & Sons Branch).
Premises . .	Offices, North Road, Ellesmere Port.
Assessment No. .	1817.

2. The following facts were admitted or proved:—

(*a*) The appellant was the Revenue Officer for the Wirral Assessment Area.

(*b*) The said hereditament consisted of offices situated 57 yards distant from the Occupiers' factory, and was occupied by the respondents, the said Occupiers.

(*c*) The said hereditament was not within the curtilage of the said factory.

(*d*) The Occupiers' factory which was hereinafter more particularly identified had been admitted to the List as an industrial hereditament.

(*e*) That the said hereditament and the said factory were in the same occupation.

(*f*) That the said hereditament and the said factory were used as parts of a single factory.

(*g*) That the net annual value of the said hereditament was 236*l.*—and that the net annual value of the said factory was 4056*l.*

3. There was exhibited a plan marked "A" which formed part of the Case. The Occupiers' factory which was enclosed by a wall and was represented by the buildings within the red line and marked A, B, C, D and E, "Flour Mill (Frosts)" on the plan, was bordered on the west by the railway belonging to the Manchester Ship Canal. There was a footbridge, the property of the respondent Occupiers, leading from the second floor of the building marked "E" over the railway to a roadway not the property of the respondents known as Merseyton Road. The hereditament, the subject of this appeal, was marked K on the plan and was coloured yellow. The hereditament stood in a walled enclosure marked M on the plan, and none of the buildings or hereditaments in the area bounded on the north by North Road, on the east by Merseyton Road, on the south by Myrtle Street, and on the west by Chestnut Grove—other than the said enclosure marked M, the hereditament marked K, the subject-matter of this appeal, and the hereditament marked G, which was a garage, were the property of or were occupied by the respondent Occupiers.

4. On the part of the appellant Revenue Officer it was contended :—

(*a*) That the said hereditament was not an industrial hereditament within the meaning of s. 3 of the Rating and Valuation (Apportionment) Act, 1928, by reason of the fact that it was primarily occupied and used for the following purposes, that is to say, the purposes of offices which were not the purposes of a factory or workshop, and/or

(*b*) That the said offices and the Occupiers' main factory were not within the same curtilage nor contiguous to one another and consequently could not be treated under s. 3, sub-s. 3, of the Rating and Valuation (Apportionment) Act, 1928, as if they formed part of a single hereditament.

(*c*) That on the true construction of s. 3, sub-s. 1 (*f*), the purposes of offices were not the purposes of a factory or workshop.

(*d*) That on the facts the said hereditament was not in law an industrial hereditament within the meaning of the Rating and Valuation (Apportionment) Act, 1928.

5. On the part of the respondent Occupiers it was contended :—

(*a*) That the said hereditament should be derated on the ground that it was an industrial hereditament within the meaning of s. 3 of the Rating and Valuation (Apportionment) Act, 1928, by reason of the fact that it was contiguous to and in the same occupation as the respondents' factory, and that it and the factory were used as parts of a single factory and should be treated as if they formed parts of a single hereditament occupied and used wholly for industrial purposes within the meaning of s. 3, sub-s. 3, and s. 4, sub-s. 2 (*b*), of the said Act.

(*b*) That upon the facts the said hereditament was in law an industrial hereditament within the meaning of the Rating and Valuation (Apportionment) Act, 1928.

6. The Court of Quarter Sessions were of opinion that the respondents' contention was correct, and they accordingly dismissed the appeal with costs and ordered the said hereditament to remain in the Special List.

7. The question for the opinion of the Court was whether upon the above facts the Court of Quarter Sessions came to a correct determination and decision in point of law.

The Revenue Officer appealed.

Sir William Jowitt A.-G., *Wilfrid Lewis* and *Colin H. Pearson* for the Revenue Officer.

Konstam K.C. and *Austin L. Jones* for Spillers, Ld.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

PINSENT (REVENUE OFFICER FOR THE PLYMOUTH ASSESSMENT AREA) v. ASSESSMENT COMMITTEE FOR THE PLYMOUTH ASSESSMENT AREA AND THE OCTAGON BREWERY COMPANY, LIMITED.

SPECIAL CASE stated by the Recorder of the City of Plymouth in accordance with the provisions of sub-s. 5 of s. 31 of the Rating and Valuation Act, 1925.

1. At the Court of Quarter Sessions held in and for the City of Plymouth upon April 24, 1930, the Revenue Officer for the Plymouth Assessment Area appealed against the decision of the Plymouth Assessment Committee to include in the Special List for the rating area of the City of Plymouth as an industrial hereditament, the hereditament therein described as follows:—

> Garage Cooperage Stores and Yard, Sawry Street, Plymouth. Assessment No. 1931.

2. The following facts were admitted or proved:—

(*a*) The appellant Francis Wingfield Homfray Pinsent was the Revenue Officer for the Plymouth Assessment Area.

(*b*) The Octagon Brewery Company, Ld., the above named respondents, were the owners and occupiers of a brewery occupying a site between Martin Street and Bath Lane in the said city, as well as being the owners and occupiers of the hereditament in question which lay between Sawry Street and Sawry Lane, being separated from that part of Martin Street, which adjoined the main brewery by the width of Martin Street and by one dwelling-house, which said dwelling-house was not occupied by the respondents. A block plan showing the position of the premises in question and of the main brewery building was annexed to and formed part of the Case.

(*c*) At the premises in question were situated the cask washery, cooperage and garage of the brewery, the premises being equipped with the necessary plant for cask-washing and repairing casks. Formerly this work was done in the main brewery building, but owing to extensions of the brewery it was found necessary to obtain another site for the cask washery and cooperage, and the Sawry Street premises were acquired for this purpose.

(*d*) The premises in question were registered, together with the main brewery, under the Factory and Workshop Acts, 1901 to 1920, and they formed an indispensable part of the brewery.

(*e*) The question of apportionment had been adjourned by the Assessment Committee and did not arise before the Recorder.

3. On behalf of the respondent Occupiers it was contended that the hereditament in question and the main brewery buildings were contiguous to one another within the meaning of s. 3, sub-s. 3, of the Rating and Valuation (Apportionment) Act, 1928, and being in the same occupation and used as parts of a single factory, should be treated as if they formed part of a single hereditament comprising both such hereditaments.

4. On behalf of the appellant it was contended that the said premises were not contiguous within the meaning of the said sub-section in that they were not actually touching. It was conceded on behalf of the appellant that if the proper meaning to be attached to the word "contiguous" in the sub-section was that of "close" or "near to" the premises in question would comply with that description.

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5. The Recorder was of opinion that the proper meaning to be attached to the word "contiguous" in s. 3, sub-s. 3, of the said Act was "touching," and, without deciding what the position would have been had the hereditaments been separated only by the width of the street, he held that the intervention of the said dwelling-house prevented the said hereditaments from being contiguous to one another within the meaning of the section, and that they could not be treated as if they formed parts of a single hereditament. He accordingly allowed the appeal.

6. The question for the opinion of the Court was whether upon the above facts the Recorder came to a correct determination and decision in point of law.

The Occupiers, the Octagon Brewery Company, appealed.

H. H. Joy K.C. and *Harold L. Murphy* for the Octagon Brewery Company.

Sir William Jowitt A.-G., *Wilfrid Lewis* and *Colin H. Pearson* for the Revenue Officer.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

BLUNT (REVENUE OFFICER FOR THE WEST DERBY ASSESSMENT AREA) v. ASSESSMENT COMMITTEE FOR THE WEST DERBY ASSESSMENT AREA AND TATE AND LYLE, LIMITED.

SPECIAL CASE stated by the Recorder of the City of Liverpool in accordance with the provisions of sub-s. 5 of s. 31 of the Rating and Valuation Act, 1925.

1. At the Court of Quarter Sessions held in and for the City of Liverpool on January 9, 1930, the Revenue Officer for the West Derby Assessment Area appealed against the decision of the West Derby Assessment Committee to include in the Special List for the rating area of the county borough of Liverpool as an industrial hereditament the hereditament therein described as follows:—

Occupiers . .	Tate & Lyle, Ld.
Premises . .	Stables, garage and yard, 25–35 Chisenhale Street, Liverpool.
Assessment No. .	1366.
Net annual value	688*l*.

2. The following facts were admitted or proved :—

(*a*) The said hereditament was situate in Chisenhale Street, Liverpool, and comprised stables, garage and yard in the sole occupation of the respondents, who were sugar refiners. The respondents (the Occupiers) occupied other hereditaments situated respectively at Love Lane, Liverpool (hereinafter referred to as their " main factory "), and at the corner of Pall Mall and Chisenhale Street, Liverpool. The last mentioned hereditament and the hereditament the subject of this appeal stood on opposite sides of Chisenhale Street.

(*b*) The said hereditament was occupied and used as follows :—

(i.) A large open shed fronting Chisenhale Street with open yard beyond containing three loose boxes.

(ii.) A two-storey stable (28 stalls and 1 loose box on the ground floor and 28 stalls and hay loft on the first floor), together with saddler's shop, harness room, stablemen's mess room and w.c.s situated on the east side of the above yard.

(iii.) A one-storey building on the Chisenhale Street front used as a wheelwright's shop and covered cart way (over which was a house separately occupied and assessed) and a garage for trailer vehicles.

(iv.) The premises were used for the garaging of the company's steam and petrol vehicles and trailers and for the reconditioning of the same, and also as stables with a yard for the horse wagons. All the vehicles, horses and wagons occupying the said premises were solely used for the purposes of the respondents' business as sugar refiners.

(v.) The wheelwright's and saddler's shops were used in connection with the maintenance of the vehicles and equipment.

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(c) The following machinery was installed in the said hereditament :—

Drilling machine . .	driven by	1¼	h.p. motor.
2 wheel grinder . . .	,, ,,	4	,, ,,
1 circular saw . .	,, ,,	12	,, ,,
1 band saw . .	,, ,,	12	,, ,,
1 mortising machine .	,, ,,	12	,, ,,
1 grindstone . .	,, ,,	12	,, ,,
1 hay cutting machine .	,, ,,	7½	,, ,,
1 ventilating fan . .	,, ,,	4	,, ,,

(d) A canal and towing path intervened between the said hereditament and the Occupiers' main factory. The distance between the said hereditament and the Occupiers' main factory was about 22 yards in a direct line. The sub-soil of the canal and towing path was vested in the canal undertaking. The hereditament was connected with the main factory only by overhead cables across the canal.

(e) The Occupiers' main factory had been included in the Special List as follows :—

Net annual value of the hereditament, 16,750*l.*

Rateable value of the hereditament, 4187*l.*

(f) The Occupiers' premises at the corner of Pall Mall and Chisenhale Street, known as 58 Pall Mall, Liverpool, had been included in the Special List as an industrial hereditament and were also the subject of an appeal by the Revenue Officer. They had been included in the Special List as follows :—

Net annual value of the hereditament, 163*l.*

Rateable value of the hereditament, 41*l.*

(g) The whole of the said hereditament was occupied and used by the respondents for the purposes enumerated in para. 2 (b) hereof.

(h) The said hereditament was registered under the Factory and Workshop Acts, 1901 to 1920.

(i) The appellant was the Revenue Officer for the West Derby Assessment Area.

3. On the part of the appellant it was contended :—

(*a*) That the said hereditament was not an industrial hereditament within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, in that it was primarily occupied and used for one of the following purposes or for a combination of such purposes, that is to say :—

I. Purposes of storage.

II. (a) The purposes of garages and/or stables ; (b) the purposes of keeping in repair the company's own vehicles which were not the purposes of a factory or workshop.

(*b*) That the said hereditament was not contiguous nor within the same curtilage as the Occupiers' main factory, and/or

(*c*) That even if the said hereditament was a factory or workshop it was not occupied or used as a factory or workshop, because such occupation and/or user was incidental or ancillary to another purpose which was not the purpose of a factory or workshop—viz., the purposes of garages and/or stables and/or for the maintenance of the Occupiers' own vehicles.

(*d*) That under the provisions of s. 3, sub-s. 2 (*b*), of the Act of 1928 the said hereditament was not a factory or workshop.

4. On the part of the respondent Occupiers it was contended :—

(*a*) That the hereditaments known as stables, garage and yard, 25-35 Chisenhale Street, Liverpool, were within the same curtilage of and/or contiguous to these respondents' main factory.

(*b*) That the said hereditaments were occupied and used as part of these respondents' factory.

(*c*) That the said hereditaments with the main factory and other hereditaments also occupied and used by the said respondents situated at 58 Pall Mall, Liverpool, should under s. 3, sub-s. 3, of the Rating and Valuation (Apportionment) Act, 1928, be treated as if they formed parts of a single hereditament comprising the said hereditaments, the main factory, and the hereditaments situated at 58 Pall Mall, Liverpool.

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(*d*) That the said hereditaments were not occupied and used for purposes not the purposes of a factory or workshop within the meaning of s. 3, sub-s. 1, of the Act of 1928.

(*e*) That the said single hereditament was not primarily occupied and used for any of the purposes or for any combination of such purposes specified in s. 3, sub-s. 1, of the Act of 1928.

(*f*) That the said single hereditament was within the meaning of the Act an industrial hereditament.

(*g*) That under s. 4 of the Act of 1928 the said single hereditament was an industrial hereditament occupied and used partly for industrial purposes, and that that part of the said industrial hereditament attributable to purposes other than industrial purposes within the meaning of s. 4 did not exceed 10 per cent. of the part thereof attributable to industrial purposes.

(*h*) That the said single hereditament of which the said hereditament formed part should be treated as if it were occupied and used wholly for industrial purposes.

5. On behalf of the respondent Assessment Committee it was contended :—

(*a*) That the hereditament described in the case for the appellant as stables, garage and yard situated at 25-35 Chisenhale Street, Liverpool, was occupied and used by the respondents Tate & Lyle, Ld., as part of such respondents' main factory and was only separated therefrom by the Leeds and Liverpool Canal.

(*b*) That the said hereditament was within the same curtilage of and/or contiguous to the main factory of the respondents Tate & Lyle, Ld.

(*c*) That the said hereditament with the main factory and other hereditaments also occupied and used by the said respondents situated at 58 Pall Mall, Liverpool, should under s. 3, sub-s. 3, of the Act of 1928 be treated as if they formed parts of a single hereditament comprising the said hereditaments, the main factory, and the hereditaments situated at 58 Pall Mall, Liverpool.

(*d*) That the said hereditaments were not occupied and used for purposes not the purposes of a factory or workshop within the meaning of s. 3, sub-s. 1, of the Act of 1928.

(*e*) That the said single hereditament was not primarily occupied and used for any of the purposes or for any combination of the purposes specified in s. 3, sub-s. 1, of the Act of 1928.

(*f*) That the said single hereditament was an industrial hereditament within the meaning of the Act of 1928 and as such was the hereditament to be apportioned between the Occupier and user (*a*) for industrial purposes, and (*b*) for other purposes under s. 4 of the Act.

(*g*) That under s. 4 of the Act of 1928 the single hereditament was an industrial hereditament occupied and used partly for industrial purposes and partly for other purposes, and that that part of the said industrial hereditament attributable to purposes other than industrial purposes within the meaning of s. 4 of the Act of 1928 did not exceed 10 per cent. of the part thereof attributable to industrial purposes and accordingly that the said single hereditament should be treated as if it were occupied and used wholly for industrial purposes pursuant to the provisions of the section.

6. In so far as it was a question of fact the Recorder found as a fact that the said hereditament was primarily occupied and used for the purposes set out in para. 2 (*b*) hereof, and that the said purposes were for the housing and maintenance of the Occupiers' own road vehicles and as stables. In so far as it was a question of law or of mixed fact and law the Recorder was of opinion on the facts set out in para. 2 (*b*) and (*d*) that the said hereditament was used as part of a single factory, and that the word "contiguous" had to be interpreted broadly and meant "near to or neighbouring, especially when no buildings intervene." He therefore decided in favour of the respondents and gave judgment in their favour.

7. The question for the opinion of the Court was whether upon the facts the Recorder came to a correct determination and decision in point of law.

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The Revenue Officer appealed.

Sir William Jowitt A.-G., *Wilfrid Lewis* and *Colin H. Pearson* for the Revenue Officer.

G. J. Lynskey K.C. and *F. A. Sellers* for Tate & Lyle, Ld.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

BLUNT (REVENUE OFFICER FOR THE WEST DERBY ASSESSMENT AREA) v. ASSESSMENT COMMITTEE FOR THE WEST DERBY ASSESSMENT AREA AND MESSRS. TATE & LYLE, LIMITED.

SPECIAL CASE stated by the Recorder of the City of Liverpool in accordance with the provisions of sub-s. 5 of s. 31 of the Rating and Valuation Act, 1925.

1. At the Court of Quarter Sessions held in and for the City of Liverpool upon January 9, 1930, the Revenue Officer for the West Derby Assessment Area, the appellant above named, appealed against the decision of the West Derby Assessment Committee to include in the Special List for the rating area of the county borough of Liverpool as an industrial hereditament, the hereditament therein described as follows :—

Occupiers . .	Messrs. Tate & Lyle, Ld.
Premises . .	Garage and works, 58 Pall Mall, Liverpool.
Assessment No. .	4716.
Net annual value	163*l*.

2. The following facts were admitted or proved :—

(*a*) The said hereditament was situated at the corner of Pall Mall and Chisenhale Street, Liverpool, and comprised a garage and works in the sole occupation of the respondents, Messrs. Tate & Lyle, Ld., who were sugar refiners. The respondents (the Occupiers) occupied other hereditaments situated respectively at Love Lane, Liverpool (hereinafter referred to as their "main factory"), and at 25-35 Chisenhale Street. The last mentioned hereditament and the hereditament the subject of this appeal stood on opposite sides of Chisenhale Street.

(*b*) The said hereditament was occupied and used as follows :—

(i.) There was a small store for coke and fuel, together with a timekeeper's wooden office (approximately 6 feet square) on the Chisenhale Street side.

(ii.) A two-storey building at the rear of an open yard, the ground floor of the building being used entirely as a store for coke and coal for the fuelling of the Occupiers' steam wagons.

(iii.) There was storage for 250 tons of coal.

(iv.) The first floor of the said two-storey building, which was entered from Chisenhale Street, was used during the day as a repair garage for the Occupiers' own road vehicles.

(v.) Six trailers were garaged in this building at night.

(vi.) All the vehicles and wagons occupying the said premises were solely used for the purposes of the respondents' business as sugar refiners.

(*c*) The said hereditament was occupied and used as enumerated in para. 2 (*b*) hereof solely for the reconditioning and garaging of the Occupiers' motor vehicles and for the storage of fuel for these vehicles.

(*d*) The said hereditament was directly opposite to the main factory and was only separated therefrom by Chisenhale Street. The distance between the two buildings across the said road was about 20 yards.

(*e*) The Occupiers' main factory was an industrial hereditament and had been included in the Special List as follows :—

Net annual value of the hereditament, 16,750*l*.

Rateable value of the hereditament, 4187*l*.

The Occupiers' premises at 25-35 Chisenhale Street, had been included in the Special List as an industrial hereditament and were also the subject of an appeal by the Revenue Officer. They had been included in the Special List as follows :—

Net annual value of the hereditament, 688*l*.

Rateable value of the hereditament, 172*l*.

(*f*) The said hereditament was not registered under the Factory and Workshop Acts, 1901 to 1920.

(*g*) The appellant was the Revenue Officer for the West Derby Assessment Area.

[Paragraphs 3, 4 and 5 are omitted, as the contentions on behalf of the appellant (Revenue Officer), the respondent Occupiers and the respondent Assessment Committee were substantially the same as in the preceding case relating to the stables, garage and yard, 25-35 Chisenhale Street, Liverpool.]

6. In so far as it was a question of fact the Recorder found as a fact that the said hereditament was primarily occupied and used for the purposes set out in para. 2 (*b*) hereof, and that the said purposes were for the housing and maintenance of the Occupiers' own road vehicles. In so far as it was a question of law or of mixed fact and law he was of opinion on the facts set out in para. 2 (*b*) and (*d*) that the said hereditament was used as part of a single factory and was contiguous to the main factory in that the land belonging thereto respectively touched in the middle of the said road, and also that the word "contiguous" meant "near to or neighbouring" and had to be interpreted broadly. He therefore decided in favour of the respondents and gave judgment in their favour.

7. The question for the opinion of the Court was whether upon the above facts the Recorder came to a correct determination and decision in point of law.

The Revenue Officer appealed.

Sir William Jowitt A.-G., *Wilfrid Lewis* and *Colin H. Pearson* for the Revenue Officer.

G. J. Lynskey K.C. and *F. A. Sellers* for Tate & Lyle, Ld.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

Jan. 22. LORD HEWART C.J. read the following judgment. The judgment which I am about to read is the judgment of the Court.

These are five Special Cases, four stated by three different Recorders, and one by a Court of County Quarter Sessions.

Each of the cases arises out of a claim by the Owners or Occupiers of an "industrial hereditament" within the meaning of s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, to have another property treated as part of their main "industrial hereditament" by virtue of s. 3, sub-s. 3, of that Act. The property sought to be added is not in any of the cases "within the same curtilage," and the claim is in each case that it is, within the meaning of the sub-section, "contiguous to" the main hereditament.

In a direct line through the air the two properties are at a distance from one another that varies in each case from about 20 yards in the fifth case to about 60 yards in the second case. In the fifth case there is nothing between the two properties except a public thoroughfare. In all the other cases there are other properties (in addition to a public road in three of them), such as a line of railway in the first and second cases, a dwelling-house of other ownership in the third, and a canal and towing path in the fourth case.

The learned Recorder of Plymouth in the third case held that the proper meaning of "contiguous to" is "touching," and therefore disallowed the claim. The learned Recorder of Cardiff in the first case has impliedly held that "contiguous to" means "neighbouring." But his decision as recorded in the case is: "I was of opinion that as the offices . . . . were a necessary adjunct to the mills without which the said mills could not be worked, the said [offices were] contiguous to the said mills within the meaning of s. 3, sub-s. 3" of the Act of 1928. The Quarter Sessions for Cheshire in the second case also impliedly held that "contiguous to" means "neighbouring." The learned Recorder of Liverpool in the fourth case holds "that the word 'contiguous' has to be interpreted broadly, and means near to or neighbouring, especially when no buildings intervene"; and in the fifth case he says he was of opinion that "the word contiguous" meant "near to or neighbouring" and had to be "interpreted broadly."

The fate of these appeals therefore depends upon the answer to the question: What is the meaning of "contiguous to" in

s. 3, sub-s. 3, of the Act of 1928? Does it mean, as the Recorder of Plymouth held, "touching or in contact with," or does it mean, as the other Courts have held, "neighbouring or in proximity to"?

As to the proper meaning of the word "contiguous" there can, we think, be no doubt. Dr. Johnson, of whom it may probably be said that he employed the English language with a more anxious precision than any other man that ever lived, defines "contiguous" in his dictionary thus: "Meeting so as to touch; bordering upon each other; not separate," and he gives no other definition. The Oxford English Dictionary gives five definitions. The first and principal one is: "Touching, in actual contact, next in space; meeting at a common boundary, bordering, adjoining." The second and third deal only with variants of that meaning, in the application of the word, not to space, but to time and thought. The fourth refers to a use now and long obsolete. The fifth is this: "*loosely*. Neighbouring, situated in close proximity (though not in contact)."

The truth is that the appellants in four cases (the respondents in the third) contend for the proper and exact meaning of the word. The respondents (the appellants in the third case) seek to apply the loose and inexact meaning. For the preference urged by the latter, their counsel adduced as their chief reason that the object of this Act is derating, and that in order to further that object, and bring about as much derating as possible, this meaning of the word should be accepted. We cannot think that this is an adequate reason. Another argument was hinted at, though the various counsel had not the hardihood to advance it—namely, that in the use of any language by the Legislature one should expect the loose and inexact, rather than the correct and exact. It is true that one who spends much time in this Court might be tempted in his haste to make some such assertion. But if he allowed cynicism to be tempered with sympathy for the harassed Parliamentary draftsman, he would reflect that it is only in regard to phrases of doubtful import that this Court is called upon to apply a toilsome scrutiny.

The task is pathological, and too much immersion in it may well induce oblivion of the fact that in comparison with the vast bulk of our legislation these difficult passages are rare. It ought to be the rule, and we are glad to think that it is the rule, that words are used in an Act of Parliament correctly and exactly, and not loosely and inexactly. Upon those who assert that that rule has been broken the burden of establishing their proposition lies heavily. And they can discharge it only by pointing to something in the context which goes to show that the loose and inexact meaning must be preferred.

This, indeed, must be not merely the legal, but also the literary canon of interpretation. No person of education or intelligence would understand, or suspect, that a writer or speaker was using the word " contiguous " in its loose sense of " neighbouring," unless there was something in the context that compelled that conclusion. If a man spoke or wrote of " contiguous islands " he must necessarily mean " neighbouring," because one island must be separated by water from another. But if he spoke of " contiguous houses " it would be difficult to suppose that he meant anything but houses touching each other.

The legal canon is the same. If there is a demise of one house in a street, and a covenant by the lessor as to " contiguous " houses, and if there be evidence that at the date of the lease all the houses in the street existed as detached and separate buildings, then the word " contiguous " may be rightly construed as meaning " next adjacent," or " contiguous houses " as " houses on contiguous plots." *Haynes* v. *King* (1) is an example of such a case. And if legal authority for so self-evident a proposition is needed, it may be observed that North J. in that case says that " contiguous " means " touching." And so it does, and must, unless the context, or the subject-matter, necessarily requires the improper alternative meaning.

Then is there anything in the context in this section which necessarily leads to the conclusion that " contiguous to " is used loosely and not exactly ? We think certainly that there

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(1) [1893] 3 Ch. 439.

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COMMITTEE.
PIERCE
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WIRRAL
ASSESSMENT
COMMITTEE.
PINSENT
v.
PLYMOUTH
ASSESSMENT
COMMITTEE.
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WEST
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ASSESSMENT
COMMITTEE.
SAME
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SAME.

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is not. The preceding words are "two or more properties within the same curtilage." It is true that there may be two edifices in the same curtilage which may not be in contact, but equally they may be. Nor in the later words of the sub-section is there anything which shows, or suggests, that the word "contiguous" cannot have been used in its true meaning, and must have been used in its occasional and inexact meaning.

The conclusion seems to be as follows. The learned Attorney-General and Mr. Wilfrid Lewis contend for the ordinary and proper meaning of the word. That contention must prevail against the attempt of their opponents to substitute another meaning, which by error is sometimes attached to the word, unless they can demonstrate not merely that that other meaning is possible, or even that it is probable, but that it must be intended. We think that the utmost they have achieved is to show that it is possible. And therefore we think that our decision should be that "contiguous to" means "contiguous to," and does not here mean "neighbouring."

The result of this decision is that the appeal in the third case, on the Case stated by the Recorder of Plymouth, is dismissed with costs, and the appeals in the first, second and fourth cases are allowed with costs.

There remains the fifth case, about certain premises of Messrs. Tate & Lyle, Ld., at Liverpool. In this case, as we have already mentioned, the whole space intervening between the two edifices is occupied by a public thoroughfare. In view of that fact Mr. Wilfrid Lewis admitted that one should be regarded as "contiguous to" the other, upon the doctrine of the extension of properties on opposites sides of a thoroughfare ad medium filum viae and upon what he considered to be the authority of *Haynes* v. *King* (1), to which we have already referred. As this admission was explicitly made, it is not for us to do otherwise than act upon it. But we must not be taken as agreeing with the proposition that *Haynes* v. *King* (1) lays down that the phrase "contiguous houses" in all cases,

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and in general, includes houses whose curtilages are separated only by a public highway—a proposition which would appear to have the result, for example, that Buckingham Palace and St. George's Hospital are " contiguous edifices." In *Haynes* v. *King* (1) there was a demise of four houses on the south side of a street and a stipulation by the lessors that they should be allowed to deal as they thought fit with " any of the premises adjoining or contiguous to the hereditaments hereby demised," even if such action diminished or affected the access of light and air to the demised premises. When the lessees sought to restrain the rebuilding of four houses on the north of the street, because that rebuilding diminished the light and air upon the demised premises, it was held by North J. that the four houses on the north side were within the liberty reserved by the covenant to the lessors, and he put some reliance upon the doctrine ad medium filum viae as justifying this loose and inexact use of the word " contiguous." In short his decision was, we think, solely a decision upon the particular facts of that case, and cannot be regarded as authority for any general proposition of law or construction.

But Mr. Lewis, having made this admission, took another point. The " property " which is sought to be added to the main hereditament by virtue of s. 3, sub-s. 3, is in fact a garage or stable ; it is precisely within the description of a " place " in s. 3, sub-s. 2. Sub-s. 2 enacts that such a place shall " be deemed not to form part of the factory or workshop." Therefore this place and the main hereditament cannot be " used as parts of a single . . . . factory, or workshop," within s. 3, sub-s. 3, inasmuch as one of the two is to " be deemed not to form part of the factory."

This seems to be a formidable argument, and Mr. Lynskey seemed to us to attempt no answer to it upon the wording of s. 3 by itself. But he relied upon s. 4 and its provision, that a hereditament may include a part not used for industrial purposes, and if the net annual value of that part does not exceed 10 per cent. of the net annual value of the other part

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that is used for industrial purposes, then both parts shall be treated as if they were used for industrial purposes. He argued that, though under s. 3, sub-s. 2, a stable within the curtilage of a factory is not to be deemed to be part of the factory, yet that stable under s. 4 could be taken into account as a part of the factory not used for industrial purposes, and if its net annual value did not exceed 10 per cent. of the annual value of the industrial part of the factory, then (in effect) the stable must be treated as, or deemed to be, part of the factory in direct cancellation of s. 3, sub-s. 2, which says that it shall not be so deemed. The final step in the argument is that, by reason of these provisions, a stable ought to be admitted as one of the two properties contemplated by s. 3, sub-s. 3, and be treated as a part of a single factory, so that the stable so added can be treated under s. 4 as a hereditament occupied and used for purposes other than industrial.

The combined effect, inter-relation and interaction of ss. 3 and 4 appear to us to be extraordinarily obscure. But upon the whole we are of opinion that a stable which by s. 3, sub-s. 2, is to "be deemed not to form part of the factory," cannot be one of the properties which "are used as parts of a single . . . . factory" within s. 3, sub-s. 3. We have not overlooked the provision in s. 4, sub-s. 2 (*c*), but effect can be given to that provision if a part of one, or of both, of the two properties "used as parts of a single . . . . factory" within s. 3, sub-s. 3, is used for other than industrial purposes within s. 4, sub-ss. 1 and 2.

The appeal in this fifth case therefore must also be allowed with costs. This conclusion makes it unnecessary to consider one other point. Sect. 3, sub-s. 3, speaks of "two or more properties . . . . treated as two or more hereditaments for the purposes of rating and valuation by reason of being situate in different parishes or of having been valued at different times or for any other reason." There is no finding in any of these cases as to the reason why the two properties were "treated as two . . . . hereditaments for the purposes of rating and valuation." It may be difficult to say if the doctrine of ejusdem generis applies to the words "or for any other reason." On the other hand the special insertion of the words "by reason of" down to "any other reason" must presumably be assumed to have been made for some purpose of limitation, and they can with difficulty be treated as entirely otiose. This point may need further consideration if and when it arises.

AVORY J. I concur in this judgment, but with reference to the last paragraph I wish to add that I take a more definite view of the effect of the provisions in sub-s. 3 of s. 3. In my opinion, to bring a case within sub-s. 3 of s. 3, I think it must appear that the two properties have been treated as two hereditaments for the purpose of rating and valuation for some special reason, e.g., by reason of being situate in different parishes or of having been valued at different times or of having been in different occupations; and there is no suggestion in any of these cases that the two properties have been so treated for any such special reason. If the words "or for any other reason" were intended to cover any hereditaments which have been treated as two or more for the purpose of rating it would have been simply expressed by the words "though rated separately."

MACKINNON J. I agree.

Appeals allowed in the first, second, fourth and fifth cases.
Appeal dismissed in the third case.

Solicitor for the Revenue Officers: *Treasury Solicitor.*

Solicitors for Spillers, Ld., Cardiff: *Wm. A. Crump & Son, for Gilbert Robertson & Co., Cardiff.*

Solicitors for Spillers, Ld., Wirral: *P. F. Walker, for Weightman, Pedder & Co., Liverpool.*

Solicitors for the Octagon Brewery Company: *Hedley Norris & Co., for Albert Gard & Ruse, Devonport.*

Solicitors for Tate & Lyle, Ld.: *Gregory, Rowcliffe & Co., for Laces & Co., Liverpool.*

R. F. S.

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4, 16.

FOSCOLO, MANGO AND COMPANY, LIMITED, AND OTHERS *v.* STAG LINE, LIMITED.

[1930. F. 66.]

Shipping—Charterparty—Bill of Lading—Liberty to call at Ports in any Order for "bunkering or other purposes"—Deviation to land Engineers supervising superheating Apparatus—"Reasonable deviation"—Damages—Carriage of Goods by Sea Act, 1924 (14 *&* 15 *Geo.* 5, *c.* 22), *Sch., Art. IV., r.* 4.

A cargo of coal was loaded on the defendants' steamship, the *Ixia*, at Swansea, for carriage to Constantinople under bills of lading, which gave the shipowners "liberty . . . . to call at any ports in any order, for bunkering or other purposes, ... all as part of the contract voyage." The shipowners were exempted by the bills of lading from liability for loss due to perils of the seas.

The *Ixia* was fitted, in the interests of the shipowners, with a superheater, and when she started from Swansea she had on board two engineers, who were there to observe whether the superheater was working efficiently. It was intended that these two engineers should be landed with the pilot at Lundy, but when the vessel reached that island no satisfactory trial of the superheater having been obtained, the two engineers remained on board, and were, later, landed in St. Ives Bay. In proceeding there, and for some time after leaving there, the *Ixia* was off the usual route. Shortly after resuming her voyage from St. Ives Bay and before she had returned to the usual route the *Ixia* stranded on the Cornish coast, and both ship and cargo were lost.

In an action in respect of the loss of the cargo:—

Held, (1.) that the departure of the *Ixia* from the contract route did not come within the liberty given by the bills of lading "to call at any ports in any order, for bunkering or other purposes," as the words "or other purposes" must be construed ejusdem generis with the word "bunkering," and as meaning the calling at a port for some purpose having relation to the contract voyage; (2.) that the deviation was not a "reasonable deviation" within Art. IV., r. 4, of the Schedule to the Carriage of Goods by Sea Act, 1924; (3.) that as the Act of 1924 has not altered the former rule whereby any unauthorized deviation from the contract route has the effect of displacing the exemptions in favour of the shipowners contained in the contract of carriage, the exemption from liability in respect of loss due to perils of the seas did not protect the shipowners; and (4.) that the shipowners were liable in damages, the measure of which was the value of the coal at Constantinople if it had been delivered there in due course.

Per Scrutton L.J.: In considering whether a deviation is "reasonable" within Art. IV., r. 4, of the Carriage of Goods by Sea Act, 1924, the interests to be considered are those of the parties to the contract adventure, and this may include consideration of the position of the underwriters.

Per Greer L.J.: The words "reasonable deviation" mean a deviation whether in the interests of the shipowner, or the cargo owner or both, to which no reasonably minded cargo owner would raise any objection.

Per Slesser L.J.: The reasonableness of a deviation must depend upon what would be contemplated reasonably by both parties to the contract adventure, having regard to the exigencies of the route, known or assumed to be known to both parties.

Appeal from a decision of MacKinnon J.

The facts, which are fully stated in the judgments, were shortly as follows: By a charterparty dated June 14, 1929, between Messrs. Vivian & Co., Ld., who had sold a large quantity of coal to the plaintiffs, and the defendants, the latter contracted to load on their steamship *Ixia* at Swansea a full and complete cargo of coal not exceeding 4350 tons nor less than 4100 tons and the vessel being so loaded was to proceed to Constantinople with all possible despatch and there deliver the cargo on being paid freight at the rate mentioned.

The charterparty provided that perils of the seas were excepted, and that " the owners in all matters arising under this contract shall also be entitled to the like privileges and rights and immunities as are contained in ss. 2 and 5 of the Carriage of Goods by Sea Act, 1924, and in Art. IV. of the Schedule thereto. The vessel shall have liberty to sail without pilots, to call at any ports in any order for bunkering or other purposes, or to make trial trips after notice or adjust compasses all as part of the contract voyage."

The cargo was duly loaded, and bills of lading were issued acknowledging receipt of the cargo by the defendants in good order and condition, and undertaking to deliver it to the plaintiffs in the like good order and condition at Constantinople. Each bill of lading contained the clause above quoted from the charterparty, giving liberty to the vessel " to call at any ports in any order for bunkering or other purposes, or to make trial trips after notice or adjust compasses all as part of the contract voyage." Further, all the provisions and conditions of the Carriage of Goods by Sea Act, 1924, and the Schedules thereto were to apply to the contract contained in the bill of lading.

The *Ixia* had been fitted with a superheater, and when she started from Swansea on the contract voyage she had on board the superintendent engineer of the defendants and a representative of the company which had supplied the superheater, in order that they might watch its operation. It was intended that they should be landed with the pilot at Lundy, but when the vessel reached Lundy no satisfactory trial of the superheater had been obtained, and the two engineers remained on board, the captain deciding to land them in St. Ives Bay, which was done, this involving a departure from the usual route. The voyage was then resumed, the vessel being still for some time off the usual route. Shortly afterwards the *Ixia* stranded on the Cornish coast, and both ship and cargo were lost.

The plaintiffs claimed damages, and contended that in putting in to St. Ives to land the two engineers the defendants had been guilty of a deviation from the contract voyage, and were, therefore, not protected by the exceptions in the charterparty.

The defendants said that by the charterparty they were entitled to the protection given to shipowners by the Carriage of Goods by Sea Act, 1924 (1), and that, if they had deviated from the contract voyage, which they denied, the deviation was reasonable under that Act. They also relied on the deviation clause in the charterparty, and said that the loss had been caused by a peril of the sea.

After the action was commenced Messrs. Vivian & Co., who were the sellers of the coal on c.i.f. terms to the plaintiffs Foscolo, Mango & Co., the dealers at Constantinople, were added as plaintiffs. As the *Ixia* was lost on her first day out from Swansea, the invoice and other documents were not sent to Constantinople, as Messrs. Vivian regarded it as useless in the circumstances to send the documents there, inasmuch as they would have to be sent back, so that the loss under the insurance policy might be collected. Messrs. Vivian & Co. accordingly kept the documents here, and collected the insurance money as agents for Foscolo, Mango & Co., and eventually transmitted the same to that firm.

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(1) Carriage of Goods by Sea Act, 1924, Schedule, Art. IV., r. 4: "Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom."

MacKinnon J., after stating that the action was in reality one between the underwriters of the cargo and the Protection Club of the ship as to which of them should bear the loss, held that there had been a deviation from the contract voyage by calling at St. Ives; that the deviation was not authorized by the language of the charterparty permitting the vessel "to call at any ports in any order for bunkering or other purposes"; that it was not a "reasonable deviation" within Art. IV., r. 4, of the Schedule to the Carriage of Goods by Sea Act, 1924; that the defendants were therefore deprived of the right of relying upon the exception of perils of the sea, and were liable in damages, which he held to be the value of the coal at Constantinople if it had been delivered there in due course.

The defendants appealed.

Dunlop K.C. and *Sir Robert Aske* for the appellants. The deviation to St. Ives was justified either under the specific words of the charterparty and bills of lading or as a "reasonable deviation" within Art. IV., r. 4, of the Schedule to the Carriage of Goods Act, 1924.

First, with regard to the clause giving liberty "to call at any ports," we concede that these words cannot be construed as enabling the vessel to call at any port in the world; the language has to be limited so as to give liberty to call at ports which are fairly and substantially within the ordinary course of the contract voyage. St. Ives was such a port. The question then is: Was the purpose for which she called there justifiable? We concede that the call must be for some business purpose, although this need not be in connection with the particular voyage, or a purpose in which the cargo owner has any concern. To "call" at a port, as Lord Esher said in *Leduc* v. *Ward* (1), "is a well-known sea-term; it means to call for the purposes of business, generally to take in or unload cargo, or to receive orders."

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(1) (1888) 20 Q. B. D. 475, 482.

[Scrutton L.J. Could the shipowner under the clause tell the captain to call at a port to arrange a charterparty for the next voyage ?]

Yes, that would be a call "for the purposes of business." Here the port was used for landing the two engineers, a legitimate business purpose. The words "bunkering or other purposes" have no limiting effect. The word "bunkering" is merely an illustration of one of the purposes for which the vessel may use a port. Whether the cargo owner has any interest in the calling at a port cannot be the test for deciding whether the calling is justifiable. For example, the calling at a port to drop the pilot is not a matter which interests the cargo owner, yet it is clearly a justifiable cause for calling. MacKinnon J. wrongly applied the ejusdem generis rule of construction to the words, "bunkering or other purposes." To apply that rule there must be a genus; the word "bunkering" cannot form a genus; it is only one species. If, contrary to our contention, it be said that to justify calling at a port within the liberty given by the charterparty and bills of lading the cargo owner must have in some way an interest in the calling, we say that in this case the cargo owners had such an interest. They have an interest in any apparatus which saves fuel and thus enables the voyage to be prosecuted more economically.

Secondly, in any view, the calling at St. Ives was a "reasonable deviation" within Art. IV., r. 4, of the Schedule to the Carriage of Goods by Sea Act, 1924. These words have altered the old law regarding deviation, so that it is now no longer necessary to show that the deviation was to save life or to show that the cargo would otherwise be exposed to imminent risk, as was the case in *The Teutonia.* (1) The test now is: Was the deviation reasonable in the particular circumstances? There is nothing in the language of r. 4 to indicate that the deviation must be in the interests of both ship and cargo. If it was reasonable in the interests of either that is sufficient.

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(1) (1872) L. R. 4 P. C. 171.

Thirdly, it is submitted that even if the deviation was unauthorized, that fact has not under the Act of 1924 the effect of depriving the shipowners of the benefit of the exceptions in the bills of lading, in this case the exception of loss by perils of the seas. This point is left open in the last editions of Scrutton on Charterparties and Carver's Carriage by Sea.

Fourthly, MacKinnon J. was wrong in awarding the damages he did. As the bills of lading were not sent to the buyers no property passed to them, and the sellers were the only persons entitled to recover, and they could recover only the amount for which they sold the coal, and not its value at Constantinople if it had been delivered there in due course.

A. T. Miller K.C. and *R. F. Hayward* for the respondents. There was clearly a deviation in fact, but the appellants seek to excuse it as being within the exceptions in the bill of lading. Those exceptions afford no protection to the shipowners. First, the ejusdem generis rule applies to the clause in the charterparty and bills of lading giving liberty "to call at any ports in any order for bunkering or other purposes." The argument that that rule cannot be applied when there is only one species named proves too much, for the result would be that the ship might call at any port accessible on the voyage. Why then mention "bunkering"? Moreover, the argument is unsound. A genus can be formed from one species: *Attorney-General* v. *Seccombe* (1), where Hamilton J. inferred a genus of benefit from the words "benefit by contract or otherwise." So here, a genus of purposes may be inferred from the words "for bunkering or other purposes"—namely, purposes connected with the common adventure.

[*Thorman* v. *Dowgate Steamship Co.* (2) was also referred to.]

Secondly, the words "reasonable deviation" in Art. IV., r. 4, of the Schedule to the Act of 1924, merely give statutory authority to the law as it stood before the Act. The word

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(1) [1911] 2 K. B. 688.

(2) [1910] 1 K. B. 410.

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"reasonable" is to be construed by the light of the earlier decisions: *The Teutonia* (1) and *Phelps, James & Co.* v. *Hill* (2); that is, where it is reasonable in the interests of both cargo owner and shipowner. In this case the deviation was wholly in the interests of the shipowners; the cargo owners knew nothing about it.

Thirdly, it is said that the Act of 1924 has swept away what were formerly the consequences of an improper deviation, and that therefore the appellants are exempted from liability for the loss, inasmuch as it was caused by a peril excepted by the bill of lading—namely, a peril of the seas. There is no warrant for this contention. The obligation still rests upon the shipowner to carry the cargo on the contract route without improper deviation. If he improperly deviates he is, as he was before the Act, deprived of the benefit of all exceptions in his favour. As was said by Lord Atkinson in *London and North Western Ry. Co.* v. *Neilson* (3), "As soon as the carrier deliberately deviates from the stipulated route he carries the goods where the consignor never agreed that they should be carried, and where he (the carrier) by his special contract never agreed that he would carry them. So far from performing the duty to which the special protective provision applies, he abandons the attempt to perform it—ceases to act in accordance with it, in fact violates it."

They were not called upon to argue the question of damages.

Dunlop K.C. replied, and cited *Baerselman* v. *Bailey* (4); *Packwood* v. *Union Castle Mail Steamship Co.* (5); and *Foreman & Ellams, Ld.* v. *Federal Steam Navigation Co.* (6)

Cur. adv. vult.

The following judgments were read:—

Feb. 16. SCRUTTON L.J. This is an appeal by a shipowning company from a judgment of MacKinnon J. holding them liable for a loss of a cargo of coal while their ship was on a voyage from Swansea to Constantinople, because the loss occurred while the ship was, without justification, deviating from the contract voyage. To appreciate the position it is necessary to state the facts in some detail.

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(1) L. R. 4 P. C. 171.
(2) [1891] 1 Q. B. 605.
(3) [1922] 2 A. C. 263, 273.
(4) [1895] 2 Q. B. 301.
(5) (1903) 20 Times L. R. 59.
(6) [1928] 2 K. B. 424.

The *Ixia* was an old ship fitted with a device called a superheater. The object of this fitting is to collect the waste steam and heat which would otherwise go up the funnel and use it again to reheat the steam and so save fuel. The steam to be collected may come from the main propelling engines or from the auxiliary engines, such as the dynamo, steam steering gear or donkey engine. The efficiency of the device depends on the correct adjustment of valves to the needs of the actual work being done. If they are too loose too much steam may escape; if too tight too much steam may be retained and exercise detrimental back pressure on the engines. On the preceding voyage to the one in question the captain had reported that the superheater was not working well and that there was danger from it to the steering gear and dynamo engines. Accordingly the shipowner had the matter looked into by the makers of the superheater, and at Swansea new valves were fitted. I gather that the correct size of valve is not a theoretical matter, but is rather empirical, depending, like the shape of the propeller, on actual experience in the particular ship at work with her usual cargo, speed and sea conditions. Accordingly, it was arranged that when the ship started from Swansea with a full cargo of coal two engineers, one from the makers of the superheater and one the superintendent engineer of the line, should accompany her for a short distance to make a test or trial (both words are used) of the efficiency of the setting of the valves under ordinary working conditions and to correct any defects by readjustment of the valves. It was expected that this test or trial would take some five hours or so and that the engineers would be dropped with the pilot off Lundy. Unfortunately when the time for starting came the firemen came on board in such a condition as to sobriety that they could not do their work effectively. Nevertheless, the ship started, but the firemen could not or would not raise a full head of steam, and such a full head was essential for the trial. When Lundy was reached no satisfactory trial had been obtained. Under ordinary

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circumstances the ship off Lundy would have been set on a course S.W. ¾ W. magnetic till she reached five miles off Pendeen, when her course would have been set for Finisterre to pass along the middle of the channel between the rock strewn coast of Cornwall to the east and the Seven Stones and Scilly Rocks to the west, a channel about eleven miles wide. In view of the desirability of completing the trial the captain decided not to follow the ordinary course, but to lay a course nearer to the coast of Cornwall, which would take him to the entrance to St. Ives Bay, where he would turn into the bay and get a boat to come out to take the engineers off. This he did, having to wait about one and a-half hours in St. Ives Bay. He then had to get back to his original course, and might have done so quite safely by going straight out till he got on the course that would take him five miles off Pendeen. Instead of that he proceeded to coast round the Cornish cliffs at a supposed distance of one and a-half miles till he got off the Longships, where he would lay his course again. The captain, owing to the events of the morning, had been a long time on duty, and he went below during this coasting, leaving the second officer in charge. The weather is described as "cloudy and showery," "overcast with slight rain," and somehow the second mate managed to run the vessel on to the Vyneck Rock, where she sustained such injury that she was totally lost. The second mate said it was the master's fault for leaving him to carry out the dangerous navigation on such a rocky coast. The master said it was entirely the second mate's fault for not doing what he was told to do, keeping a certain distance from the shore. The evidence of the sub-commander of pilots for the St. Ives district, which the judge accepted, was: "(A.) The proper course is to pass within four or five miles of Pendeen, the safe course down the Channel. (Mr. Miller.) Then haul down to the southward to make Finisterre? (A.) And then steer down for Finisterre. (Q.) Would you consider it safe or proper to bring a ship in within a mile and a-half? (A.) Not a safe course. (Q.) And if a vessel instead of running on that course stands in for the coast and anchors or stops off St. Ives, is she running any greater risk ? (A.) Certainly she would be running a greater risk than if she stood on her proper course from Lundy down five miles off Pendeen. (Q.) Such risk as is attached to coasting on a rocky coast ? (A.) Certainly. It is a very dangerous coast from St. Ives round," and that coasting course was certainly not the ordinary or safe course from Swansea to Finisterre.

On this evidence the plaintiffs argued that the shipowners had improperly deviated, that the loss occurred on and because of the deviation, and that the excepted perils, such as perils of the sea, did not therefore protect the shipowners. The shipowners in answer relied on the terms of the bill of lading and the rules under the Carriage of Goods by Sea Act, 1924, incorporated thereunder. They argued, first, that the voyage was within the voyage allowed by the contract, and what they did was therefore not a deviation at all. They had liberty under the bill of lading "to call at any ports in any order for bunkering or other purposes as part of the contract voyage." The cargo owners replied that these wide words must, on the authorities, be restricted by the nature of the main adventure to ports having some relation to the joint adventure of carrying cargo from Swansea to Constantinople; that the words "other purposes" must receive a similar limitation. It could not be that the ship might call for "any purpose," as if the captain wanted to see his wife, and that the mere presence of the word "bunkering" supported this view. It was not wanted, if calling for "any purpose" was allowed. They also argued that what had happened was a "trial trip," and it was made "without notice," and not therefore part of the contract voyage.

There is a well known principle of construction expressed by Lord Halsbury in *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1) as follows: "Words, however general, may be limited with respect to the subject-matter in relation to which they are used." This is expressed by Lord Herschell in *Glynn* v. *Margetson & Co.* (2) thus: "Where general words are used in a printed form which are obviously intended to apply, so far as they are applicable, to the circumstances of a particular contract, which particular contract is to be embodied in or introduced into that printed form, I think you are justified in looking at the main object and intent of the contract and in limiting the general words used, having in view that object and intent." In that case a clause "bound for Liverpool, with liberty to proceed to and stay at any port or ports in any station in the Mediterranean, Levant, Black Sea, or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain and Ireland, for the purpose of delivering coals, cargo, or passengers, or for any other purpose whatsoever," was construed as giving a liberty consistent with the main object of the contract, a liberty only to proceed to and stay at the ports which were in the course of the voyage in a business sense.

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(1) (1887) 12 App. Cas. 484, 490.

(2) [1893] A. C. 351, 355.

The same limitation would apply to the wide words "any purposes"; they must be the purposes of the contract adventure. The preceding word "bunkering" assists that view. As Lord Mansfield says in *Moore* v. *Magrath* (1): "It is very common to put in a sweeping clause; and the use and object of it in general is, to guard against any accidental omission; but in such cases it is meant to refer to estates or things of the same nature and description with those that have been already mentioned." I do not propose to discuss the numerous cases that have explained and confused the so-called rule of ejusdem generis; but the presence of the word "bunkering" shows that there is a limitation on the general words following. If they were unlimited its mention would be unnecessary. To land a maker's engineer and a ship's engineer who have been detained on the ship, while making a trial trip not authorized by the contract of affreightment, because of the drunkenness of the firemen, and to land them at a port on a dangerous coast and not in the course of the voyage does not seem to me to be a purpose or voyage permitted by the contract.

As to the clause, "with liberty to make trial trips with notice," some trials require to be made with a full cargo as,

(1) (1774) 1 Cowp. 9, 12.

for instance, to test fulfilment of a contract as to the speed of the vessel fully loaded. They might involve departure from the contract voyage, as in runs backwards and forwards over the measured mile. They might involve use of the engines for other purposes than those of the contract voyage. The trial of the superheater valves, the representative of the maker says, is sometimes done by starting from, for example, Barry and making a run to the Nash Light and back. He also says that the trial takes from five to seven hours, and that ordinary working conditions with a full head of steam are necessary. The engineers then go round the machinery and see that everything is working all right and that the relief valve is functioning under sea conditions, such as putting the helm hard over and seeing that she is opening out to any relief. From the captain's letter of April 16, 1929, and the engineer's report of May 16, 1929, as to the previous voyage, it appears that owing to the relief valves not working well the back pressure was preventing the steering gear from working properly. It is obvious that manœuvres would have to be performed with the steering gear and auxiliary engines, which would not necessarily be performed at that time on an ordinary voyage. The bill of lading gives power to perform trial trips on the contract voyage if notice is given. The notice is presumably to allow cargo owners to see that their insurance is in order. No notice was given in this case the ship's representative says, because he did not anticipate any trouble, and thought the firemen would be all right and the trial over by Lundy. It is evident he did not look at his bill of lading. In my opinion this trial trip was not part of the contract voyage, and was therefore a deviation, both in delay and in route and risk.

If what was done was not part of the contract voyage the next question is, was what happened a justifiable deviation ? Art. IV., r. 4, of the Schedule to the Act of 1924 is as follows : "Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss

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or damage resulting therefrom." This certainly alters the previous law in one respect. Previously, deviation to save life was allowed, but not deviation to save property, unless, as has not been unusual lately, there was a clause in the bill of lading allowing it. A deviation to save property and earn salvage in which the cargo owner would not share might cause greatly increased risk and delay with no benefit to the cargo owner. The rule, however, now allows a deviation to save property. The rule proceeds to allow "any reasonable deviation." It gives no indication whose interests are to be considered. For instance, where the master finds a stowaway on board, it may be "reasonable," if only the interest of the ship is concerned, to get rid of him by a deviation to some port even if some distance away. The delay may be detrimental to the cargo owner. I think the interests to be considered must be those of the parties to the adventure in the contract adventure, which may include consideration of the position of their underwriters. MacKinnon J. has confessed himself quite unable to understand what "reasonable" means. I think it is a pity it was used without more indication of whose interests were to be considered. But I am disposed to adopt the meaning given to the word by the House of Lords in *Hick* v. *Raymond & Reid*. (1) The question there was whether a reasonable time for loading was to be the reasonable time in ordinary circumstances or in the circumstances then existing. Lord Herschell phrases it thus (2): "The only sound principle is that the 'reasonable time' should depend on the circumstances which actually exist. If the cargo has been taken with all reasonable despatch under those circumstances I think the obligation of the consignee has been fulfilled. When I say the circumstances which actually exist, I, of course, imply that those circumstances, in so far as they involve delay, have not been caused or contributed to by the consignee." Applying that to the present case, the present deviation was necessitated by the steamer starting with drunken firemen and a short supply of steam, which might, if a storm had sprung up, have landed the owner into difficulties as to unseaworthiness. I do not think r. 4 was intended to extend the permissible limits of deviation as stated in *The Teutonia* (1): "It seems obvious that, if a master receives credible information that, if he continues in the direct course of his voyage, his ship will be exposed to some imminent peril, as, for instance, that there are pirates in his course, or icebergs, or other dangers of navigation, he must be justified in pausing and deviating from the direct course, and taking any step which a prudent man would take for the purpose of avoiding the danger," and I cannot believe that the passage on p. 180 of the report of that case was intended always to exclude the necessity of considering the interests of both parties to the adventure or of preventing the consideration of the fact that the deviation was entered upon because of the default of one party to the adventure. I agree with the view of the judge below that this was not a "reasonable deviation."

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(1) [1893] A. C. 22.

(2) [1893] A. C. 29.

One further point was argued as to the effect of the deviation, if proved. There is sometimes difficulty in distinguishing deviation from negligence in navigation, as illustrated by *Rio Tinto Co.* v. *Seed Shipping Co.* (2) But in that case the master intended to pursue the contract voyage, though by negligence he set an entirely wrong course. In the present case the master intended not to pursue the ordinary course of the voyage. Before the Carriage of Goods by Sea Act, 1924, the effect of unjustified deviation was clear; the ship was deprived of the protection of exceptions, for they only applied to a ship on the contract voyage. It was argued that the Act of 1924 had altered the law, and (if I understood the argument; I am not sure that I did) that the exceptions applied even to an unjustified deviation. I cannot accept this argument in the absence of any clear words effecting such a serious alteration of the law. When the Act intended to abolish the absolute warranty of seaworthiness it said so in clear terms by s. 2 of the Act. I should expect equally clear words to abolish the well recognized rule as to the consequences of deviation. If I understood the argument I cannot accede to it.

(1) (1872) L.R. 4 P.C. 171, 179.

(2) (1926) 42 Times L.R. 381.

One further point on damages was raised. The cargo of coal was sold by vendors to purchasers on c.i.f. terms, but the property had not passed at the time of the loss. The contract price was roughly 6000*l.*; the cargo was insured for 7000*l.*; and the arrived market value at Constantinople was 8000*l.* The defendants argued that as the property had not passed the vendors could not recover more than the price they would get if the cargo arrived. The judge disregarded the contract and gave the market price on arrival. In my opinion it is clearly established that this is the correct measure of damages. Unless the contract was in the contemplation of both parties its terms cannot be used either to reduce damages, because the vendors would not have got the market value, if the cargo had arrived, but only the contract price; or to increase damages, because that is what the vendors have really lost: see *Rodocanachi* v. *Milburn* (1); *Williams Brothers* v. *Agius* (2); and *James Finlay & Co.* v. *N. V. Kwik Hoo Tong.* (3) Both vendors and purchasers are appearing as plaintiffs by the same solicitor, and it is not necessary to make any distinction between them in the judgment. The appeal must be dismissed with costs.

GREER L.J. This is an appeal by the defendants from a judgment of MacKinnon J., whereby he adjudged the defendants to pay to the plaintiffs 8000*l.* damages and costs, for breach of contract, or for breach of duty, as carriers in respect of a cargo of coal which they undertook to carry from Cardiff to Constantinople on the terms contained in a bill of lading dated June 29, 1929. The acts complained of by the plaintiffs were alleged to be either breaches of contract or breaches of duty, and any decision with regard to the liability of the defendants must depend not merely on the express terms of the contract, but also on the terms which the bill of lading is obliged to incorporate by reason of the Carriage of Goods by Sea Act, 1924.

The following are the relevant facts proved in evidence. By the bill of lading the goods are stated to be shipped at

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(1) (1886) 18 Q. B. D. 67.
(2) [1914] A. C. 510.
(3) [1929] 1 K. B. 400.

Swansea on the steamship *Ixia* bound for Constantinople, "with liberty to sail without pilots to call at any ports in any order for bunkering or other purposes or to make trial trips after notice or adjust compasses all as part of the contract voyage." As required by the Carriage of Goods by Sea Act, 1924, the bill of lading stated that all the terms provisions and conditions of that Act and the Schedule thereto were to apply to the contract contained in the bill of lading, and the owners and the charterers were to be entitled to the benefit of all privileges, rights and immunities contained in such Act and the Schedule thereto as if the same were therein specifically set out. If, or to the extent that, any term in the bill of lading was repugnant to or inconsistent with such Act or Schedule it was to be void. Before she started on the voyage to be considered in the present case, the owners had installed on board the steamship a superheater. This is an apparatus for the purpose of utilizing what otherwise would be waste heat for the purposes of the steam steering gear and other engines or apparatus ancillary to the main engines. The superheater was not required to enable the vessel to duly perform the voyage contracted for. It is a device which enables her to economize in the use of coal. It was a matter of no consequence to the cargo owner whether the steamer had a superheater or not, or whether if it had a superheater the same was in working order. The superheater on the *Ixia* had not been working satisfactorily, and before the ship started on the voyage to Constantinople alterations had been made to the superheater, with a view to rendering it efficient. On June 30, 1929, the *Ixia* started on her voyage from Swansea, where the alterations to the superheater had been effected. She took on board the defendants' superintendent engineer, and a representative of the firm responsible for the superheater, with the object of ascertaining by test whether the superheater was satisfactory or not. This test could only be adequately made if the engine developed a full head of steam. When the vessel started the firemen were drunk, and until they sobered down it was impossible to get a full head of steam. As far as somewhere near Lundy Island the vessel proceeded on the usual sea route on a voyage from Swansea to Constantinople. It had been intended that the two experts should be put on the pilot boat when the pilot left the steamer in the neighbourhood of Lundy Island, but as the test had not then been completed it was necessary to make some other provision for preventing the experts being carried too far on the journey. Thereupon the captain altered the course of the vessel so as to bring her somewhere near St. Ives Bay. The test continued on this altered course, and when the vessel arrived opposite St. Ives Bay she changed her course to go further in the Bay, signalled for a boat, and dropped her two passengers. The captain then, instead of directly returning to the usual route, as he might have done, possibly to save time, directed the second officer to follow the coast line, keeping a mile and a-half from the coast. If the second officer had strictly obeyed this injunction there would have been no accident, but he failed to do so, with the result that the vessel struck a rock and became a total wreck, and the plaintiffs' cargo was lost. Under these circumstances the plaintiffs contended that at the time of the loss the vessel was engaged in an unauthorized deviation, and was therefore disentitled to the immunity from liability for damage occasioned by perils of the sea, which she would otherwise have been entitled to under Art. IV., r. 2, of the Carriage of Goods by Sea Act, 1924.

The learned judge found for the plaintiffs, and awarded them 8000*l*. damages, which he estimated to be the market value that the goods would have had if they had been duly carried to Constantinople.

The appellants contended that the goods were lost while the ship was by reason of the liberty contained in the bill of lading pursuing her contract voyage, and secondly, that in any event the deviation was a reasonable one within the meaning of r. 4 of Art. IV. of the Act. On the other hand it was contended for the respondents, first, that the deviation was not a deviation to call at a port for bunkering or other purposes within the meaning of the bill of lading; secondly, that if it was, it was a liberty to deviate in excess of the deviation permitted by Art. IV., r. 4, and was therefore unlawful; thirdly, that the loss happened as a consequence of the vessel having made a trial trip without giving notice, and as there is a special provision for making trial trips after notice, such a trip could not be within the meaning of the words "other purposes" in the bill of lading; and lastly, that on the evidence in the case the judge was right in holding that at the time of the loss the vessel was not engaged in a reasonable deviation. MacKinnon J. held that when the vessel was lost she was not calling at a port for any purpose included in the words "for bunkering or other purposes," that she was, therefore, deviating from the agreed contract voyage, and that such deviation was not a "reasonable deviation" within Art. IV., r. 4, of the Carriage of Goods by Sea Act, 1924.

The first question to be determined is whether or not the learned judge was right in holding that the vessel was at the time of her loss deviating from the contract voyage. The contract voyage in the present case is described as a voyage to Constantinople, with liberty to do certain things in the course of the voyage which would not ordinarily be included in the contractual duty to proceed to Constantinople. In my view the liberties mentioned in the bill of lading are part of the description of the contract voyage, and any action of the ship within the prescribed liberties could not be described as deviation, but would be accurately described as acts in performance of the contract voyage. The point to be determined is whether the words "liberty to call at any port in any order for bunkering or other purposes" included what the ship did in the present case. It was contended for the respondents that the words "other purposes" should by their context be limited to purposes similar to bunkering, which were for the furtherance of the joint adventure of shipper and shipowner. On the other hand, the appellants contended that the ejusdem generis rule has no application to general words in a contract which follow one specific instance, but that it is confined to cases where general words follow a number of specific instances which can be said to belong to a class or genus. In support of this view they relied especially on the decision of the Court of Appeal in *Baerselman* v. *Bailey*. (1) In that case the Court was concerned with the meaning of the following words in the bill of lading, "any act, negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner in navigating the ship, or otherwise." It was there held that the general words did not indicate something resembling negligence in navigation, but related to negligence in navigating the ship, and in matters other than navigating it. In that case it seems clear from the words of the bill of lading that the exception was intended to cover not merely the acts of the pilot, master and mariners, the only persons concerned in navigation, but also the acts of other servants of the company. It does not seem to me to be a decision to the effect that in no case can the ejusdem generis doctrine, or some similar canon of interpretation, be applied to the interpretation of general words preceded by only one specific instance. In *Packwood* v. *Union Castle Mail Steamship Co.* (2) Walton J. held that the words of an exception of damage arising from any act, neglect, or default of the master, officers, crew, or any servant of the shipowner "in providing, despatching, and navigating a vessel or otherwise," were wide enough to cover the negligence of some servant of the company who was not engaged in either providing, despatching or navigating the vessel. Walton J. seems to have thought that the case was within the authority of *Baerselman* v. *Bailey*. (1) This seems to be right, as the clause was necessarily intended to protect the shipowner from the acts of servants other than master, officers and crew, who were the only persons except the owner who were engaged in providing, despatching and navigating the vessel or any work similar thereto. It does not seem to me that these cases afford any authority for the view that the doctrine of ejusdem generis cannot be applied to words such as those which are used in the bill of lading under consideration. I think, as I said in *Aktieselskabet Frank* v. *Namaqua Copper Co.* (3), that in applying the ejusdem generis rule it is not necessary to ascertain with exactitude what is the scientific definition of the genus to which the general words are supposed to be confined. I think it is sufficient if one can reasonably say that the event that has happened was of a like kind to some one or more of the specific events which precede the general words. In *Attorney-General* v. *Seccombe* (1) the Court had to construe the words of a taxing Act that property subject to tax should include "property taken under any gift, whenever made, of which property bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise." Hamilton J. held that the words "or otherwise" must be read as meaning some arrangement ejusdem generis with contract, that is to say an enforceable arrangement. In my judgment the reasoning that led him to this conclusion is applicable to the point under consideration in this case. I think the words "bunkering or any other purpose" indicate a genus of which "bunkering" is a species, that is to say, purposes reasonably required in the interest of both parties for the furtherance of the carrying voyage. In every case the words of the contract are to be read with their context. The context of general words may be a number of specific instances or one only, and in either case the general words are to be interpreted by the light of their context. To call at a port for bunkering purposes is to call for a purpose in furtherance of the joint adventure of the ship and cargo. It was admitted in argument that some limitation must be put on the words "other purposes," and that they are not wide enough to include any purpose whatsoever. It was contended that they should be limited only to purposes which were business purposes of the ship, whether they were of any interest to the cargo owner or not. In my judgment, construing these words in the light of the general objects of the contract recorded in the bill of lading and of the contiguity of the word "bunkering," I think the true meaning of the words is that the purposes must be purposes relevant to the furtherance of the joint adventure, and that they are not wide enough to include the visit of this ship to St. Ives Bay, a visit which was not in any way essential to the carriage of the respondents' goods from Swansea to Constantinople. I therefore think that the learned judge was right in holding that when the vessel was lost she was not on her contract voyage, and the ship is liable for the loss of the cargo unless she is protected by Art. IV., r. 4, of the Carriage of Goods by Sea Act, 1924. Rule 4 is as follows: "Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom." Apart from the provisions of the Act, the ship was entitled to deviate from the agreed voyage for the purpose of saving life, or when such deviation was reasonably necessary to avoid imminent peril. *The Teutonia* (1) and *Phelps, James & Co.* v. *Hill* (2) afford instances of the latter permitted deviation recognized at common law. Those cases probably depend upon an implied term in the contract. I do not think the words of r. 4, Art. IV., of the Act are confined to cases of this kind. I think r. 4 is to be read as enlarging the area in which a deviation will not be deemed to be a breach of the contract. I think the word "reasonable" is used in its ordinary sense in relation to what would otherwise be a deviation occurring in the course of the voyage. We must picture to ourselves the cargo owner and the shipowner being present when the occasion for the deviation arises and ask ourselves, "Could the cargo owner object to the course taken by the vessel without being unreasonable?" It is to be remembered that the statute was passed to give effect to a convention between representatives of shipowners and traders. One can understand shipowners objecting to the hardship they suffered, by having the advantages of their contract entirely taken away by a slight deviation from the contract route of such a character that no reasonable cargo

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(1) [1895] 2 Q. B. 301.
(2) (1903) 20 Times L. R. 59.
(3) (1920) 25 Com. Cas. 212.

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(1) [1911] 2 K. B. 688.

(1) L. R. 4 P. C. 171.

(2) [1891] 1 Q. B. 605.

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owner would object to it. I do not think that the words "reasonable deviation" ought to be treated as confined to reasonably necessary or required for or directed to the interests of both parties. I think the words mean a deviation whether in the interests of the ship or the cargo owner or both, to which no reasonably minded cargo owner would raise any objection. In my judgment if the ship had contented herself with going into St. Ives Bay and there putting the two engineers ashore, and had then proceeded directly to get back on to the usual route for vessels going from Swansea to Constantinople, the deviation would have been a reasonable deviation within the meaning of the rule. This is not what the ship did. By the master's orders, after landing the engineers the ship proceeded along a dangerous coast instead of getting back to the safe waters where she would have been if she had not deviated at all. In my judgment, from the time that the mate took charge under the master's orders and started to navigate the vessel along the coast, the deviation became an unreasonable one. The ship ought to have been taken, according to the evidence, to a position where she would pass within four or five miles off Pendeen, where she would have been on a safe course down channel instead of being taken within a mile and a-half off the coast, which was not a safe course, but was a course along a very dangerous coast.

It was further contended on behalf of the appellants that the well established rule of law that a deviating ship loses the benefit of the exceptions in the contract no longer applies since the Act of 1924. I agree with the learned judge that there is nothing in this point. The provisions of the Act import into the agreement compulsorily certain exceptions, but there is nothing in the Act to show that these exceptions can be relied upon while the vessel is not pursuing the contract voyage, but is pursuing a voyage, or part of it, which is not covered by the contract at all. Many other points were discussed in the course of the argument before us, but if I am right in the view I have expressed this is sufficient to determine the appeal, and in my judgment it is not necessary to express any opinion on other matters which I do not think arise for decision at present.

As regards the measure of damages, I am of opinion that the learned judge was right. As the property had not passed from Vivian & Co. at the time of the loss they were the proper plaintiffs. The fact that they had sold the goods at a price which was less than the market price that the goods would have had on arrival at Constantinople cannot, according to the authorities, be used in order to diminish the damages, just as it could not be used to inflate the damages if it happened to be a larger sum than such market price. So far as this Court is concerned we are bound to accept this view of the law by the decision in *James Finlay & Co.* v. *N. V. Kwik Hoo Tong.* (1) Scrutton L.J. there states the result of the decided cases in the following words (2): "Before the decision in *Hall* v. *Pim (Junior) & Co.* (3) we had been brought up to understand that, as a general rule, sub-contracts entered into by a buyer cannot be used to increase or minimize his damages, as the sub-contracts are incidental matters with which the seller had nothing to do. I find that laid down in *Rodocanachi* v. *Milburn* (4), which was affirmed in *Williams Bros.* v. *Agius* (5), and in an unreported case in which Greer L.J. was counsel the House repeated the language of *Williams Bros.* v. *Agius* (5) and affirmed *Rodocanachi* v. *Milburn.* (4) This Court in *Slater* v. *Hoyle & Smith* (6) applied the same principle, that unless the seller contemplates the possibility of a sub-contract under which a claim may be made on the buyer, the sub-contract must be disregarded for the purpose either of increasing or diminishing the damages." I agree that this appeal should be dismissed.

SLESSER L.J. I agree that this appeal fails. In this action the plaintiffs claimed damages from the defendants for breach of contract or breach of duty as carriers to carry certain goods under bills of lading to an agreed destination on

(1) [1929] 1 K. B. 400.
(2) Ibid. 411.
(3) (1928) 33 Com. Cas. 324.
(4) (1886) 18 Q. B. D. 67.
(5) [1914] A. C. 510.
(6) [1920] 2 K. B. 11.

an agreed voyage. It is conceded by the defence that the goods were lost during the agreed voyage, but such loss being due to the perils of the sea or the wreck of the ship, it is said that under the exception in the contract the defendants are not liable in damages. There is no doubt that the goods were so lost owing to the perils of the sea or the wreck of the ship, but the plaintiffs reply that the defendants cannot here rely on the exception or perils of the sea or wreck of the ship, because, in the circumstances, they had lost the right to rely upon the exception which would otherwise protect them, in that they had broken the contract by not doing the thing contracted for in the way contracted for, and, consequently, cannot rely on conditions which were only intended to protect them if they carried out the contract in the way they had contracted to do it: see per Scrutton L.J. in *Gibaud* v. *Great Eastern Ry. Co.* (1)

The material facts of the case are as follows: There was shipped upon the *Ixia* at Swansea and bound for Constantinople under a number of bills of lading containing similar terms certain steam coal. On a previous voyage, without the knowledge of the plaintiffs, the defendants had used an apparatus called a superheater, the object of which was to utilize waste steam so as to make an economy in running. It is not necessary to consider the working of this device except to say that, owing to its failure to work properly on this previous voyage, when the *Ixia* started on the contract voyage to Constantinople which is here in question, it had on board a representative of the makers of the superheater and also the superintendent engineer of the defendants, both of whom joined the ship at Swansea. The intention had been that the tests should thereafter immediately be made, and that these two experts should leave the ship with the pilot at or before they reached Lundy Island, but, owing to a failure of the firemen, who were drunk, to get up a proper head of steam, which was necessary for the test of the superheater, the two gentlemen had to remain on the ship after the pilot had left. They then arranged with the captain that the ship

(1) [1921] 2 K. B. 426, 435.

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should go to the small port of St. Ives in Cornwall, which was admittedly a deviation from the normal voyage to Constantinople, taking the vessel more to the eastward and by a route more dangerous, as the evidence shows, than otherwise would have been the case. The *Ixia* lay to in St. Ives Bay, a boat came alongside, and the engineers got into it and went on shore. The ship then proceeded on its way. After a short time the captain went below and left the second mate in charge, with instructions to keep a mile and a-half off the coast and follow down in that way—not to sail by a compass course. In the event, the second mate ran the vessel on to a rock called the Vyneck Rock, where it became a total loss. The goods of the plaintiffs were also lost, and it is in respect of that loss that they claim damages.

With this brief statement of fact, I proceed to consider the arguments which have been addressed to us by way of appeal from the judgment of MacKinnon J., who has decided that the plaintiffs recover 8000*l*. damages, and that both under the terms of the bill of lading itself and under the 1924 statute the defendants fail in their endeavour to rely upon the exception in the contract which might otherwise protect them.

The case for the defendants on the bill of lading that they were within their contract depends upon the liberty therein given them "to call at any ports in any order for bunkering or other purposes." They say, first of all, as indeed they must, that St. Ives is a port within the meaning of the liberty, and, in so far as there is no limitation of the word "port" in the bill of lading, I think they are right in this contention. It was shown in the evidence and in the documents disclosed that St. Ives is a port. The real difficulty in the defendants' way lies in the consequent words "for bunkering or other purposes." It is argued for the defendants that the words "other purposes" here are wide enough to include any business purpose connected with the voyage. Mr. Dunlop had to concede during the argument that for the captain to call for the purpose of visiting his wife would not be an "other purpose" within the meaning of those words.

On the other hand, it was argued by him and Sir Robert Aske that it is not possible here to apply the doctrine of ejusdem generis, inasmuch as the word "bunkering" appears as an isolated species of purpose, and that there is no genus to which the words "other purposes" can be assimilated. The authority which is cited against him on this head of the argument, and which was relied upon by the learned judge in the Court below, is *Attorney-General* v. *Seccombe.* (1) That was a case under the Customs and Inland Revenue Acts as applied by the Finance Act, 1894, wherein occurred the words that certain property should be affected by taxation "if retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise." Here, also, it was argued that the words "or otherwise" should not be read as ejusdem generis with contract, in that the word "contract" was itself but a species, and there was, therefore, no genus. Hamilton J. said (2): "The words 'by contract or otherwise' indicate a genus of which contract is one species, and all other species are intended to be swept in. I do not see the difficulty of saying that there is a genus of which contract is a species." On a strict application of the ejusdem generis rule it may be argued with some force that to construct a genus out of one species and undefined general words (which together with the species have gone to form the genus) in order to define the denotation of those general words is but a petitio principii, but, however that may be, on the wider consideration of the intention and context, there is ample authority for the view expressed by Hamilton J. In *Monck* v. *Hilton* (3) the appellant was convicted for using a device "by palmistry or otherwise" to deceive. He pretended to have the supernatural faculty of obtaining from invisible agents messages or powers. Cleasby B. said (4): "It was further contended that the words 'or otherwise' following a particular word, 'palmistry,' must be read as having reference to arts or pretensions of the same description as palmistry, according to a general rule of construction limiting the effect of general words following a particular description. As to the general rule, no authority was necessary." There the Court rejected the contention that the words "or otherwise" only applied to modes of deception of any precise class or genus of which palmistry could be said to be an instance. In *Williams* v. *Golding* (1) the ejusdem generis rule was applied to the single term "district surveyor or other person," and it was held that a right to one month's notice of action for anything done under the Metropolitan Building Act, 1855, was limited to persons ejusdem generis with a district surveyor. Under the heading "generic words following more specific," in Maxwell's Interpretation of Statutes, 7th ed., p. 284, appears the following: "It is, however, the use of a general word following one or more less general terms ejusdem generis which affords the most frequent illustration of the rule under consideration." I mention this in deference to Sir Robert Aske's argument that the doctrine cannot logically be applied where there is only one species, but once this view is rejected it becomes a question of the intention of the parties as expressed in their written agreement whether they did mean to limit the words "or other purposes," and, if so, what limitation they intended to place upon them. In *Margetson* v. *Glynn* (2) Fry L.J. in construing a liberty under a bill of lading "to proceed to and stay at any port or ports, in any rotation, ... for the purpose of delivering coals, cargo, or passengers, or for any other purposes whatsoever," holding with the rest of the Court that the general words of the bill of lading must be limited with reference to the specific voyage, and that they only allowed the ship to proceed to ports which were fairly and substantially in the ordinary course of the voyage, said (3): "Our decision depends, as it appears to me, upon an ancient and well-established principle of construction, of which *Leduc* v. *Ward* (4) is one of the most recent illustrations. I think that principle of construction is not confined to this class of documents, but is applicable to all documents. This

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(1) [1911] 2 K. B. 688.
(2) Ibid. 703.
(3) (1877) 2 Ex. D. 268.
(4) Ibid. 275.

(1) (1865) L. R. 1 C. P. 69.
(2) [1892] 1 Q. B. 337.
(3) [1892] 1 Q. B. 344.
(4) 20 Q. B. D. 475.

principle is applicable wherever specific words are used to express the main object and intent of the instrument, and in some other parts general words are used which in their utmost generality would be inconsistent with and destructive of the main object of the contract. When the Court in dealing with a contract or document of any kind finds that difficulty, it always, so far as I know, follows this principle, that the general words must be limited so that they shall be consistent with and shall not defeat the main object of the contracting parties." The words of the species of liberty in this present case are far narrower than in *Margetson* v. *Glynn* (1), being confined to bunkering. I think that the words " or other purposes " in this context mean purposes other than but analogous to bunkering. This does not include all other possible purposes, but points to a dichotomy between " bunkering " and " purposes in the nature of bunkering," which latter words, nevertheless, are to be read as in one genus with the former. An essential element of such a synthesis of bunkering and other purposes would be the taking on board of materials necessary for the prosecution of the voyage. In my judgment, to call at a port to take on board other materials than coal—provisions, medical supplies and the like—may properly be said to be purposes in the nature of, though other than, bunkering. It is very possible that on a liberal construction of the words " calling at ports " for repairs might possibly fall within the definition, but I am clear that the genus " bunkering or other purposes " should not be extended to include any and every business purpose so long as it is connected with the voyage. So to hold would be to construe the words as a general liberty to call, say to discharge or to take in cargo, in which case the word " bunkering " would be otiose, and so offend the doctrine that upon the true construction of bills of lading words must be read reasonably and with a view to all the circumstances: *Steamship Knutsford, Ld.* v. *Tillmanns & Co.* (2) In *Baerselman* v. *Bailey* (3) the wider language of the liberty was held to justify a wider connotation, but that case

(1) [1892] 1 Q. B. 337.
(2) [1908] A. C. 406.
(3) [1895] 2 Q. B. 301.

does not, in my view, at all help the defendants in this one.

Applying these considerations to the present case, I have come to the conclusion that the setting down of these two men for their convenience, or for the convenience of the shipowner, was not a calling for the purpose of bunkering or any other similar purpose. It was not necessary for the prosecution of the voyage, for, as far as the cargo owner was concerned, there was no reason why these two engineers should not be carried on to Constantinople, if, indeed, it were necessary to have them on board at all. If we have regard to the intention of the parties, it is impossible to think that the words " liberty to call at any port for bunkering or other purposes " can properly be extended to cover all conveniences of the shipowner or a third party. Moreover, on the facts disclosed in this case the deviation occurred for a trial trip. Trial trips with notice to the cargo owner are expressly permitted during the performance of the contract, but here, in my view, the deviation to land these men was a consequence and part of a trial trip without notice, which is by implication excluded from the contract, and so in its turn, when undertaken, excludes the benefits of the exceptions to the shipowner.

The second defence, that raised under the statute, is one of great difficulty and of great importance. Before the passing of the Carriage of Goods by Sea Act, 1924, certain deviations were undoubtedly permissible, such deviations being an exception to the general rule that " in the absence of express stipulation to the contrary the owner of a vessel, whether a general ship or chartered for a special voyage, impliedly undertakes to proceed in that ship without unnecessary deviation in the usual and customary manner " : Scrutton on Charterparties, 12th ed., art. 99. According to the authorities, of which *Scaramanga & Co.* v. *Stamp* (1) is a leading example, a deviation for the purpose of saving life was justified, but not a deviation for the mere purpose of saving property. If a master receive credible information

(1) (1880) 5 C. P. D. 295.

that if he continue in the correct course of his voyage his ship or cargo would be exposed to some imminent peril, he would be justified in a reasonable deviation to avoid the peril. He may take any step that a prudent man would take for the purpose of avoiding the danger: see *The Teutonia.* (1) This being the law before the passing of the 1924 Act, it is not suggested that in the present case the deviation into St. Ives Bay could have been justified as a deviation, apart from any specific liberty before the statute, for there was here no question of saving life nor of avoiding peril. But the defendants here contend that the Schedule to the 1924 Act, Art. IV., r. 4, relating to bills of lading, have given them a statutory right to deviation on the facts of the present case. The provisions of Art. IV., r. 4, are as follows: "Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom." These provisions create two new clauses of deviation—namely, first, any deviation in saving or attempting to save property at sea, and, secondly, any reasonable deviation. It is under the latter permission that the defendants here seek to come, and the problem thus arises: What is the meaning of the words "reasonable deviation" in r. 4? It is argued by Mr. Dunlop, as I understand him, that it can be extended to cover any deviation during a contract voyage which a prudent owner or master of a vessel might think fit, which is a question of fact. At the other extreme, it is said that the section has really made no difference to the existing law beyond adding the right to deviate to save property. As between these two conditions, both of which I reject, there are the views expressed by Wright J. in *Foreman & Ellams, Ld.* v. *Federal Steam Navigation Co.* (2), where the learned judge says (3): "The expression 'reasonable deviation' may give rise to considerable difficulties. I think it is clear that a deviation would not be reasonable

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(1) L. R. 4 P. C. 171.
(2) [1928] 2 K. B. 424.
(3) [1928] 2 K. B. 431.

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merely because it was convenient to the shipowner. Its reasonableness must depend upon what would be contemplated reasonably by both parties having regard to the exigencies of the route, known, or assumed to be known, to both parties." And he goes on to give, as an example of his meaning: "I think in this case that shippers on a cargo liner of this type must be deemed to have known the circumstances of mercantile geography such as the position as to the amount of water available at Cairns and the probable draught of a vessel of this type, and it is on that ground that I do not think the deviation here, the only deviation which I think is before me, can be regarded as unreasonable." This view would appear to indicate that the criterion of reasonableness must depend upon what would be contemplated reasonably by both parties, or assumed to be known to both parties. In the present case MacKinnon J. takes a slightly different view. He has searched the dictionary for definitions of the word "reasonable." He says that he has not the faintest idea what is to be regarded as "reasonable deviation," but he is satisfied that the putting into St. Ives was not a reasonable deviation. He appears to treat the matter as one of fact, but also states that it was no concern of the cargo owner and not part of any joint interest of the cargo owner and the shipowner. It will be observed that both these learned judges associate the cargo owner and the shipowner together in considering what test is to be applied, Wright J. looking to what was known, or assumed to be known, to both parties in order to test the reasonableness of the deviation, MacKinnon J. apparently deciding the matter as one of fact, or taking his standard from the point of view of the interest of the parties. I do not know that there is any very vital difference between these points of view; but for myself, I adopt the view presented obiter by Wright J. for the following reasons. The rules which are by the statute to be applied to bills of lading are in effect implied terms thereof imported into the individual contract. Sect. 2, for example, says: "There shall not be implied in any contract for the carriage of goods by sea to which the rules apply" certain undertakings. Such a statutory provision is sometimes put positively, as in the Coal Mines (Minimum Wage) Act, 1912, which, by s. 1, sub-s. 1, says that: "It shall be an implied term of every contract" that certain conditions shall obtain. With regard to the specific provisions of Art. IV., r. 4, as to deviation for the saving of life or property, no question of the knowledge of the cargo owner can arise, for these are rights of deviation specifically bestowed upon the shipowner in certain defined events, as in the common law case of avoiding perils, but as regards the phrase "reasonable deviation," had a similar specific provision appeared in the bill of lading itself before the passing of the Act, I think that the bilateral nature of the contract, the mutual interest in the voyage and in the security of the ship and goods, would induce the Court to say that the test of reasonableness of the deviation would have had to be regarded from the point of view of reasonableness in regard to conditions in or about the voyage known or contemplated by both parties.

In deviation the parties contracting have voluntarily substituted another voyage for that which has been agreed: see per Roche J. in *Rio Tinto Co.* v. *Seed Shipping Co.* (1), citing Lord Mansfield in *Lavabre* v. *Wilson.* (2) "So soon as the parties have agreed upon the voyage, and have written that in, the definition of the voyage must, as a matter of business, cut down the general words to what is fairly applicable to the voyage which has been agreed upon and defined": per Bowen L.J. in *Margetson* v. *Glynn.* (3) If these observations be true in construing a bill of lading containing the phrase "deviation," I cannot see why a similar standard should not obtain when the words are imported into the contract by operation of statute.

Applying this test, it is evident in the present case that neither the existence nor the deficiencies of the superheater nor the necessity, if it existed, for its trial, nor the landing of the engineers were known or could fairly be assumed to be known to the cargo owner. This is not a case like that of

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(1) (1926) 42 Times L. R. 381; 24 Ll. L. Rep. 316.

(2) (1779) 1 Doug. 284.

(3) [1892] 1 Q. B. 337, 343.

Foreman & Ellams, Ld. v. *Federal Steam Navigation Co.* (1), where the circumstances of mercantile geography and the probable draught of a vessel of a certain type might be held to be in the knowledge or contemplation of the parties to make a deviation in certain waters reasonable. I have, therefore, adopting Wright J.'s criterion, come to the conclusion that the defendants fail to establish any protection under the Carriage of Goods by Sea Act.

If, however, as MacKinnon J. seems to indicate, the question of reasonableness of deviation is one wholly of fact, then, as in the case of *James Nelson & Sons, Ld.* v. *Nelson Line (Liverpool), Ld.* (*No.* 2) (2), the question of reasonableness may be one which might be left to a jury without further direction, and, although this is not my view (for, as I have indicated, I think that the test laid down by Wright J. is a correct one), yet, if it be so, the learned judge has found against the appellants that this was not, in his opinion, on any construction, a reasonable deviation, and, for this reason also, there being evidence on which the learned judge could so find, I am of opinion that this appeal should fail.

Appeal dismissed.

Solicitors for appellants: *Holman, Fenwick & Willan.*

Solicitors for respondents: *Charles Lightbound, Jones & Lightbound, for Ingledew & Co., Newcastle-upon-Tyne.*

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(1) [1928] 2 K. B. 424.

(2) [1907] 1 K. B. 769.

J. S. H.

COMMISSIONERS OF INLAND REVENUE *v.* SIR H. C. HOLDER, BT., AND ANOTHER.

K. B. D.
1930
Dec. 16.
C. A.
1931
Feb. 18, 19;
March 11.

Revenue—Income Tax—Guarantees of Company's Indebtedness to Bank—Interest unpaid each Half Year added to Sum advanced—Payment by Guarantors of total Indebtedness—Payment out of Profits or Gains brought into Charge—Claim to Repayment of Income Tax on Part representing Interest—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 36, *sub-s.* 1.

To secure a company's indebtedness to a bank the respondents from time to time gave guarantees to the bank. From 1920 onwards the company was indebted to the bank continuously, and the interest on the amount owing from time to time was debited half-yearly to the company's account. On November 17, 1926, when the company had become completely insolvent, the respondents satisfied the whole indebtedness to the bank by means of a loan from the bank to the respondents personally. The respondents claimed repayment of income tax under s. 36, sub-s. 1, of the Income Tax Act, 1918, on the part of the total sum paid amounting to 17,861*l.* 16*s.* 5*d.*, which represented interest debited half-yearly to the company's account with the bank:—

Held (reversing Rowlatt J.'s decision), (1.) that the interest due each half-year which, upon the failure of the company to pay it, was, according to the regular practice of bankers, added to the capital sum advanced, was thereby capitalized and could not thereafter be treated as interest paid under the sub-section.

Ex parte Bevan (1803) 9 Ves. 223; *Lord Clancarty* v. *Latouche* (1810) 1 B. & B. 420; and *Reddie* v. *Williamson* (1863) 1 Macph. 228 applied.

(2.) That, in any case, a payment by guarantors to a bank under their guarantee did not, even when the payment was of interest due from the principal debtor, fall within s. 36, sub-s. 1, of the Act of 1918.

Case stated under the Finance Act, 1925, s. 19, sub-s. 3, and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on June 24, 1929, and an adjourned meeting held on July 9, 1929, the claim was heard of Sir Henry C. Holder, Bart., and Mr. J. A. Holder (hereinafter called "the respondents"), who were aggrieved by the decision of the Commissioners of Inland Revenue (hereinafter called "the appellants") in respect of a claim made by the respondents for repayment of income tax under s. 36 of the Income Tax Act, 1918 (which provides for the

repayment in certain cases of income tax in respect of interest paid to banks without deduction of tax out of taxed profits).

2. The respondents were interested in a company called Blumfield, Ld. (hereinafter referred to as "the company"). The company had been indebted for many years to its bankers, the London, City and Midland Bank, Ld., which changed its name to the Midland Bank, Ld., and is hereinafter referred to as "the bank." To secure the company's indebtedness to the bank, guarantees were given from time to time by the respondents to the bank. In some cases the guarantees were given by the respondents individually, and in the other cases by the respondents jointly and severally.

3. Under these guarantees, all of which were in similar form, the guarantor (or guarantors) undertook, in consideration of the bank allowing the company (therein called "the principal") to keep an account with the bank or otherwise granting the company banking facilities or accommodation, "to pay and satisfy to the bank all and every the sum or sums of money which shall at any time be owing to the bank anywhere on any account . . . . for notes or bills discounted or paid or for other loans, credits or advances made to or for the accommodation or at the request of the principal . . . . or for any moneys for which the principal may be liable as surety or in any other way whatsoever, together with in all the cases aforesaid all interest, discount and other bankers' charges including legal charges occasioned by or incident to this or any other security held by or offered to the bank for the same indebtedness or by or to the enforcement of any such security."

The total liability ultimately enforceable against the guarantor (or guarantors) under each guarantee was limited to a definite sum.

4. From the year 1920 onwards the company was indebted to the bank continuously in large amounts. The interest on the amounts owing from time to time to the bank was debited half-yearly in the company's account with the bank. Payments into the account were made by the company from time to time, but the amount due to the bank, with the

exception of the half-year to December 31, 1924, increased each half-year.

The bank pressed the respondents from time to time for payment, and the whole indebtedness of the company to the bank was finally satisfied by the respondents on November 17, 1926, by means of a loan made by the bank to the respondents personally.

The company was completely insolvent, and there was no chance of the respondents obtaining any reimbursement from the company of the amount paid by them to the bank under the guarantees.

5. The respondents in terms of s. 19 of the Finance Act, 1925, claimed repayment of income tax under s. 36 of the Income Tax Act, 1918, on the interest amounting to 17,861*l.* 16*s.* 5*d.*, debited half-yearly to the company's account with the bank from January 1, 1920, to November 17, 1926, which the respondents contended was paid by them on November 17, 1926, when the company's indebtedness to the bank was satisfied by them as aforesaid. The appellants refused the claim in toto, and also contended at the hearing of the appeal that as regards the interest debited for the first three of the half years this had been satisfied under the rule in *Clayton's* case (1) by the subsequent payments by the company into their account with the bank.

6. It was contended on behalf of the respondents :—

(1.) That the payment made by the respondents to the bank on November 17, 1926, was a payment of principal and interest due to the bank, and included a payment of interest as such.

(2.) That the debiting of the interest in the account did not amount to payment of the interest : *In re Morris, Mayhew* v. *Halton* (2) ; *In re Jauncey. Bird* v. *Arnold.* (3)

(3.) That the rule in *Clayton's* case (1) did not apply, and

(4.) That repayment of income tax should be made for the year 1926–7 in respect of the whole of the interest amounting to 17,861*l.* 16*s.* 5*d.*

(1) (1816) 1 Mer. 572, 585, 608. (2) [1921] 1 Ch. 172.
(3) [1926] Ch. 471.

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7. It was contended on behalf of the Commissioners of Inland Revenue (inter alia):—

(1.) That the whole of the payment made by the respondents to the bank was in satisfaction of the debt due under the guarantee, and that no part of the payment was interest as such: *Bradford Old Bank* v. *Sutcliffe.* (1)

(2.) That in view of the bank's practice of adding the interest each half-year to the amount advanced the interest was in effect paid each half-year, and that for this reason also no part of the payment made by the respondents (except the amount of interest charged from July 1, 1926, to November 17, 1926) was interest. The following cases were referred to in support: *Bradford Old Bank* v. *Sutcliffe* (1); *Eaton* v. *Bell* (2); *Crosskill* v. *Bower* (3); *Parr's Banking Co.* v. *Yates* (4); *Provincial Bank of Ireland* v. *O'Reilly* (5); *Reddie* v. *Williamson.* (6)

(3.) That alternatively the interest for the first three of the half-years had under the rule in *Clayton's* case (7) been satisfied by the subsequent payments by the company into the account: *Deeley* v. *Lloyds Bank, Ld.* (8)

(4.) That the respondents were not entitled to the relief claimed.

8. The Special Commissioners held, following previous decisions of the Special Commissioners on this point, that having regard to the decision in the case of *Parr's Banking Co.* v. *Yates* (4), the payment made by the respondents on November 17, 1926, included interest paid as interest.

The Special Commissioners further held that the interest was not in effect paid each half-year by being added to the amount of the advance.

The Special Commissioners accordingly admitted the claim for repayment for the year 1926–7 under s. 36 of the Income Tax Act, 1918, but they decided that under the rule in *Clayton's* case (7) the interest debited in the account for the first three half-years to June 30, 1921, must be regarded as having been paid by the company, and that accordingly the respondents' claim must be restricted to the interest charged from July 1, 1921.

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(1) [1918] 2 K. B. 833.

(2) (1821) 5 B. & Ald. 34.

(3) (1863) 32 L. J. (Ch.) 540.

(4) [1898] 2 Q. B. 460.

(5) (1890) 26 L. R. Ir. 313.

(6) 1 Macph. 228.

(7) 1 Mer. 572, 585, 608.

(8) [1912] A. C. 756.

9. The appellants immediately after the determination of the appeal declared their dissatisfaction therewith as being erroneous in point of law and in due course required the Special Commissioners to state a case for the opinion of the High Court.

10. The question of law for the opinion of the Court was whether any, and if so what, portion of the payment made by the respondents to the bank under their guarantees was interest, so as to entitle them to repayment of income tax thereon under s. 36 of the Income Tax Act, 1918.

Sir Wm. Jowitt A.-G. and *R. P. Hills* for the Crown.
Latter K.C. and *Cyril King* for the respondents.

ROWLATT J. In this case the respondents, Sir Henry C. Holder and Mr. J. A. Holder, were guarantors, under the usual stringent form of a bank guarantee, for a company called Blumfield, Ld., for a number of years. To put it shortly, the indebtedness of the company to the bank grew worse and worse, the interest on the loan from the bank was only partially paid, and the unpaid interest was added to the principal at the end of each half-year in what I believe is the usual way. The guarantors paid off the total amount of the debt to the bank, and in respect of the amount which represents interest, save for a certain part of it, they claim to be repaid the income tax which they did not deduct when they paid the interest, although it was paid out of profits and gains brought into charge to tax. They claim to be repaid the income tax which they might, if it had been annual interest paid out of profits and gains brought into charge to tax, have deducted and kept for themselves in the ordinary course. They seek to have it repaid to them under s. 36, sub-s. 1, of the Income Tax Act, 1918, and the Commissioners have allowed the claim.

The Attorney-General takes two points on behalf of the Crown. He says, first of all, that a guarantor paying to a bank a debt consisting of principal and interest is not within s. 36, sub-s. 1, at all, because he is not the person who has had the accommodation; he is merely a friend who has stood by the debtor and has been victimized or has suffered by the loss of the debtor. That is roughly his point, but I cannot see how that argument can be supported. The section simply says that, "Where interest payable in the United Kingdom on an advance from a bank . . . . is paid to the bank without deduction of tax out of profits or gains brought into charge to tax, the person by whom the interest is paid shall be entitled . . . . to repayment of tax on the amount of the interest." If the guarantors paid it out of profits or gains brought into charge to tax, why have not they paid interest upon an advance from the bank? The contract with the bank was that they would pay the interest if the person guaranteed did not, and I cannot see any reason for cutting down the section. It is true that curious results might perhaps happen, for instance, a guarantor might pay the interest without deducting the tax and subsequently obtain repayment of the tax. Afterwards he might be repaid by the principal debtor out of capital; he could not however be repaid more than he had paid. A guarantor has many privileges, but making a profit out of a guarantee is, I am bound to say, new to me. The principal debtor would only repay the guarantor what he actually paid—that is the interest less the income tax which he had been repaid. In those circumstances the Crown would lose the income tax upon the interest, because the interest would ultimately have been paid out of a fund which had not suffered deduction for income tax, and not out of profits and gains brought into charge. It is a small and curious point, but I do not see how it helps me to construe this section. The real truth is that more precautions should have been taken when this section was passed. Anyhow, I do not think I can say that the guarantor is not within the section. It seems to me that the guarantor is in just the same position as the principal debtor. That point I do not think has been made good.

The other point is this. The Attorney-General said that this interest when the guarantors paid it off had been transformed into principal because it had been debited in the accounts of the bank every half-year and swelled the balance of the account in the ordinary way. There have been a certain number of cases about what happens when there are special arrangements between the parties as to how the matter of principal and interest shall be reckoned, and questions have arisen as to how the account stands in the end. But I think one thing is clear, that if interest is capitalized in the sense in which it is charged in this case, it must not be assumed that it is necessarily capitalized for all purposes. That seems to be the sense of the matter and to answer this point. We are not concerned with the particular arrangement for calculating these things; we are simply concerned with the application of this section. Now why should this interest be treated as capital? There is no reason at all for treating it as capital except to defeat this application. It is simply arrears of interest. It has been treated as capital in the accounts of the bank but I cannot see why it should be treated as capital for the purpose of this section, however it may be treated for other purposes.

There is another thing which strikes me very forcibly. Of course this interest that is paid to the bank has been paid out of a fund that has been charged to income tax. There would be no room for the application of this section if it had not been so paid. The guarantor comes and says that he paid interest to the bank out of profits and gains brought into charge, and that he wants to be put in the same position with regard to the income tax on that interest as if he had deducted it and kept it. I am bound to say I think that is a very plausible way of putting it and I cannot see the answer to it. It seems to me that what is interest for one purpose must surely be interest for another. The Attorney-General said that it is interest as the bank receive it; they receive it as income; but that it is not interest as the payer pays it.

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It is the same sum of money, there is no question about it, and the same passing of the money which is interest in one sense and not interest in another. I am afraid that is a wrong way of looking at the matter. I think therefore the right way is to dismiss this appeal with costs.

Appeal dismissed.

R. F. S.

The Inland Revenue Commissioners appealed. The appeal was heard on February 18, 19, 1931.

Sir W. Jowitt A.-G. and *R. P. Hills* for the appellants. The respondents are not entitled to repayment of income tax upon so much of the total sum paid by them to the Midland Bank, Ld., under their guarantees as is said to be attributable to interest. The repayment is sought under s. 36, sub-s. 1, of the Income Tax Act, 1918, which originated in the Finance Act, 1915, s. 22, a section passed to facilitate the raising of money on short loan from banks for the purpose of subscribing to Government issues during the war. The provision was made necessary by the fact that the ordinary right to deduct and retain income tax, where interest on a loan has been paid out of profits or gains already brought into charge for tax, only arises in the case of yearly interest. Interest on short loans and overdrafts from a bank has to be paid without deduction; and therefore this provision was enacted giving a right to repayment of the tax upon the interest paid out of profits and gains already brought into charge.

First, the respondents are not entitled to analyse the payment made by them under their guarantees and treat 17,861*l.* as a payment of interest. When following the normal practice the bank capitalized the interest due at the end of each half-year, the increased sum owing at the beginning of each successive half-year was no longer interest, but additional capital. What really happens in such a case is that the bank treats the interest as paid and a further loan as having been made of the sum required to pay it. The Special

Commissioners in deciding against the Crown relied on *Parr's Banking Co.* v. *Yates* (1), but that case when carefully examined really supports the Crown's argument. That was a case of a guarantee of advances by a bank, and, all advances having been made more than six years before, the guarantor was held not to be liable to pay the amount of the advances. He was however liable to pay interest which had fallen due during the preceding six years. This would not have been so if it had continued to be treated as interest, for interest is an accessory to principal, so that when the claim to payment of the capital is gone the claim to the interest is also gone. There, as here, the course followed was to debit the principal debtor at the end of each half-year with the interest for the half-year, and treat that as added to the loan. Vaughan Williams L.J. says in regard to that (2): " According to the ordinary practice of bankers the interest due is from time to time added to the principal, and becomes itself part of the principal due." That is the Crown's contention in this case, and it is also supported by *Reddie* v. *Williamson*. (3)

In *In re Morris* (4) the view was taken that the interest had not been capitalized under an agreement for payment of 40,000*l.* on the happening of a future event with compound interest thereon at 4½ per cent. per annum with annual rests. But that was a conclusion come to on the construction of the particular document which referred to compound interest with annual rests. Here the question is as to the effect of accounts kept in accordance with the practice of bankers. In this case there is capitalization for all purposes and all interest down to June 30, 1926, has been capitalized.

This would still leave the interest from June to November as something paid as interest; but it is contended that even in regard to this sum the guarantors are not entitled to repayment of tax, because s. 36, sub-s. 1, is inapplicable to a payment by a guarantor under a guarantee. The words in s. 36, " where interest . . . . is paid to the bank," mean when interest is paid as such and, if what is paid is a sum due under a guarantee it cannot be said to be interest. The guarantor is merely paying the debt of the principal debtor. It will be said that the Special Commissioners have found as a fact that the payment is of interest, but their decision is not of a mere question of fact, but a decision of law resting on a misunderstanding of *Parr's Banking Co.* v. *Yates.* (1) Here the contracts between the guarantors and the bank and that between the company and the bank are entirely separate, and the guarantors merely paid a sum falling due under their contracts with the bank. No part of the sum paid can therefore be regarded as interest.

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(1) [1898] 2 Q. B. 460.
(2) Ibid. 467.
(3) 1 Macph. 228.
(4) [1922] 1 Ch. 126, 130.

Spens K.C. and *Cyril King* for the respondents. A guarantor called on to pay the debt of the principal debtor is entitled to analyse the amount payable, so as to ascertain the part attributable to interest. That is the effect of the decision in *Parr's Banking Co.* v. *Yates.* (1) It was only by analysing the amount claimed that it could be ascertained that during the last preceding six years no advance had been made, the increase in the sum owing being attributed solely to interest left unpaid. That analysis was for the purpose of seeing whether the Statute of Limitations applied. A like analysis can therefore be made here, and it shows that 17,861*l.* out of the payment made by the guarantors is attributable to interest. It follows that for the purpose of the taxing Acts it should be treated as interest. The words of s. 36, sub-s. 1, of the Income Tax Act, 1918, therefore apply.

[LORD HANWORTH M.R. Whilst it is true that s. 36 does not indicate by whom interest is to be paid, is it not intended to apply to a payment of interest by a person receiving an advance from a bank ?]

It is contended that the section is not so limited in effect. Here the guarantors were paying a debt due by them to the bank, which included interest on an advance. It is not as if the guarantors were not under a legal obligation to pay the bank. As an argument against the respondents' contention it has been said that the respondents might make a profit if their contention that s. 36 applies is correct.

(1) [1898] 2 Q. B. 460.

[LORD HANWORTH M.R. That is not an argument that appeals to me. We are only concerned to construe the section.]

It is contended that on the true construction of the section the respondents are entitled to succeed. The appellants contend that if the respondents are to be treated as having paid interest at all, that can only be so as to interest not already capitalized at the date of payment by virtue of the bank's system of book-keeping. That is a serious argument, for it would apply just as much to an ultimate payment by the customer as to a payment by a guarantor. It is suggested that the true effect of what is done each half-year by the bank is to charge compound interest, and that unpaid interest is merely treated as capital for the purpose of charging interest on it until paid. Cases such as *In re Craven's Mortgage* (1) and *In re Morris* (2) are therefore directly in point. It is true that there are dicta in *Lord Clancarty* v. *Latouche* (3) suggesting that the effect of the custom of bankers is to capitalize each half-year's interest, but it is submitted that the implied contract between the bank and its customer is for the bank to charge compound interest on its advances: *Crosskill* v. *Bower* (4); *Provincial Bank of Ireland* v. *O'Reilly*. (5) In revenue matters the Court has to look at the substance of the matter and not to have regard to any legal fiction such as is involved in the bank treating the interest as paid and adding its amount to the capital advanced to the customer.

[LORD HANWORTH M.R. Before the repeal of the usury laws the half-yearly interest on an advance by a bank was treated as capitalized: *Eaton* v. *Bell* (6); *Hunter* v. *The King*. (7)]

That is the fiction which the Court ought to disregard in a revenue case.

R. P. Hills replied.

Cur. adv. vult.

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(1) [1907] 2 Ch. 448.
(2) [1922] 1 Ch. 126.
(3) 1 B. & B. 420.
(4) 32 L. J. (Ch.) 540, 545.
(5) 26 L. R. Ir. 313.
(6) 5 B. & Ald. 34.
(7) [1904] A. C. 161, 164.

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March 11. The following written judgments were read:—

LORD HANWORTH M.R. This is an appeal from a judgment of Rowlatt J. dated December 16, 1930, whereby he confirmed the decision of the Commissioners for Special Purposes, who decided in favour of the respondents to the appeal.

The respondents gave guarantees to the London, City and Midland Bank, Ld., under which they made themselves responsible for the indebtedness to the bank of Blumfield, Ld. The total sum which the respondents were called upon to pay upon the default of Blumfield, Ld., was large, amounting to 64,482*l.* 16*s.* 8*d.* The question that has to be determined is whether the respondents are entitled to have this total sum of over 64,000*l.* analysed and split up into its component parts of capital and interest, and to pray in aid the terms of s. 36 of the Income Tax Act, 1918, under which a claim may be made for the repayment of income tax upon sums paid to banks in respect of interest out of taxed profits without deduction of tax.

The account of Blumfield, Ld., with the bank from 1919 to 1926—the period covered by the guarantees—was always in debit, and interest was charged half-yearly on June 30 and December 31 upon the advances made by the bank to the company. The system adopted was that at each half-year the charges for interest were added to the capital sum advanced, and the total sum carried forward into the next half-year as one undivided advance.

The interest was thus capitalized, and became an integral part of the advance to the company. The Commissioners held that when the respondents paid up the total sum due under their guarantee to the bank, as they did on November 17, 1926, that payment included interest, paid as interest. They further held that that interest was not in effect paid each half-year by being added to the amount of the capital advanced, and therefore they held that s. 36 applied and operated in the respondents' favour, and justified a claim for repayment of the income tax not deducted.

The decision of the Commissioners was based upon the judgment in *Parr's Banking Co.* v. *Yates.* (1) Rowlatt J. affirmed the Commissioners, and rejected the two points on which the Attorney-General based his argument, and now appeals to this Court.

They are, firstly, that s. 36 does not apply to such a lump payment as this. Whatever has been paid by the respondents has been paid as a totality. The sum paid is capital and interest upon it capitalized in the way usual with bankers. The sum now paid over on account of interest to the bank is not interest during the year of charge such as is contemplated by s. 36. The section only applies to payments of interest, which at the times when the payments are made are respectively subject to the annual charge made upon them when the annual Finance Act charging income tax is passed.

Secondly, it is not right to analyse the total sum paid up by the guarantors. The sum due on November 17, 1926, is no longer severable ; but all, whether in part composed of capital advance, and interest, and charges thereon, is payable under a direct liability to the bank assumed by the guarantors, which becomes effective upon the default of the principal debtor, and each component item that makes up the total to be paid is of the same quality and degree as between the bank and the guarantors.

It is the person who has had the accommodation and has to pay interest from time to time upon it that is entitled to the repayment permitted under s. 36, not a person whose liability to pay arises from a different contract.

It is necessary therefore to examine these questions. *Parr's Banking Co.* v. *Yates* (1) does not in my judgment cover the point to be decided. In fact Rigby L.J. in his judgment (2) seems expressly to hold that an account kept as this was effected a transposition of the interest, due and unpaid, into capital. His words are : " I think one must assume that the understanding of all parties was that the account would be kept as between the person guaranteed and the bank on the usual principle with regard to such accounts—that is to say,

(1) [1898] 2 Q. B. 460.

(2) [1898] 2 Q. B. 467.

by treating moneys paid in from time to time by the customer as a deduction from the general amount due from the customer in respect of the loan and interest thereon, and at the end of each half-year carrying over the debit balance to the next half-year as principal."

Vaughan Williams L.J. agreed, and pointed out that for the purpose of that case the cause of action on the guarantee arose as to each item of the account, whether principal or interest, as soon as it became due and was not paid, and that the Statute of Limitations began to run in favour of the defendants in respect of each item from that date.

The observations thus made by the Lords Justices appear to have been relevant to the decision, which was that the claim of the bankers in respect of the principal sum due was barred by the lapse of six years before action brought since the last capital sum accrued due.

The case is important, for it recognizes the system of bankers in turning interest into capital as usual and binding on the parties who have acquiesced in it. It seems to be a question in each case whether the customer did acquiesce in it: see *Fergusson* v. *Fyffe* (1) and *Spencer* v. *Wakefield*. (2) The Commissioners' finding that interest was not in effect paid each half-year by being added to the amount of the advance, appears to follow a misunderstanding of *Parr's Banking Co.* v. *Yates* (3), and if so, not to be conclusive as a question of fact.

The plan of capitalizing interest at the end of each half-year was adopted by bankers in order to enable them in effect to secure what is usually termed compound interest, which could not have otherwise been claimed by reason of the usury laws: see *Ex parte Bevan* (4); *Eaton* v. *Bell* (5); and *Lord Clancarty* v. *Latouche*. (6)

The usury laws were repealed by 17 & 18 Vict. c. 90, which by s. 3 left untouched the payment of any interest "now payable upon any contract, express or implied."

(1) (1840) 8 Cl. & F. 121.
(2) (1887) 4 Times L. R. 194.
(3) [1898] 2 Q. B. 460.
(4) 9 Ves. 223.
(5) 5 B. & Ald. 34.
(6) 1 B. & B. 420, 430.

There seems no reason to ascribe a different effect in law to a system under which, before the Act repealing the usury laws was passed, unpaid interest was turned into capital, even though the reason or necessity for it has passed away or changed. The terms of the contract remain whether express or implied.

It was held by the Court of Session in Scotland in 1863, in *Reddie* v. *Williamson* (1), that the effect of the method adopted by the bank in the present case—namely, the accumulation of interest at each stop—converted the interest so accumulated into an advance by the bank. Lord Cowan held (2): "The true view is, that the periodical interest at the end of each year is a debt to be then paid, and which must be held to have been paid when placed to the debit of the account as an additional advance by the bank for the convenience of the obligants." I respectfully agree with this view: see also *Yourell* v. *Hibernian Bank* (3), per Lord Atkinson.

There are some cases in which it has been held that half-yearly or yearly rests had not made the interest so dealt with capital for all purposes: see *In re Craven's Mortgage* (4) and *In re Morris*. (5)

In the first of these Warrington J. followed *Bebb* v. *Bunny* (6), and held that the interest paid on a mortgage fell within s. 40 of the Income Tax Act, 1853. He expressly decided, upon the terms of the deed before him, that there was nothing in it to capitalize the interest, or to change its character or make it something which it was not before.

In re Morris (5) was also decided upon the terms of the mortgage deed under which the expectancies of the mortgagors were conveyed to an insurance society subject to redemption on payment to the society of a sum of 40,000*l.* at a time contemplated, with compound interest thereon at the rate of 4½ per cent. with annual rests. *Craven's* case (4) was followed, and it was held that the compound interest had not been capitalized. Lord Sterndale expressly decided the

(1) 1 Macph. 228.
(2) Ibid. 238.
(3) [1918] A. C. 372, 385.
(4) [1907] 2 Ch. 448.
(5) [1922] 1 Ch. 126.
(6) (1854) 1 K. & J. 216.

case upon the terms used in the mortgage, which in his opinion were not sufficient to connote capitalization. Warrington L.J. declined to deal with anything except the document which was before the Court, and Younger L.J. thought the operation whereby the compound interest was calculated, although it produced a result not in substance distinguishable from a capitalization of interest, was not, and was not intended to be, capitalization.

We are here considering not the terms of a particular deed entered into between the parties, but a practice which has been adopted by bankers for over a century, and which has had certain qualities attributed to it. It prevailed between Blumfield, Ld., and their bankers for nearly seven years; and I think that upon the true inference from the facts, and under direction of the cases rightly understood, it must be held that the interest down to November, 1926, had been capitalized with the approval of the principal debtors. This concludes the appeal as to all except 1341*l.* 18*s.* 1*d.*, which formed part of the total paid, but was in fact interest.

As to the second point of the Attorney-General, which covers the total sum paid up to the bank under the guarantees, the question is, does s. 36 enure in favour of a guarantor?

The Income Tax Act, 1918, is a Consolidation Act, and the origin of s. 36 may be looked at. Sub-s. 1 corresponds with s. 22 of the Finance Act, 1915, and sub-s. 2 with s. 15 of the Finance Act, 1917.

Both these sections provide a special procedure. It is not the system of deduction of the tax from the interest paid by the payer who is authorized by r. 19 of the All Schedules Rules to deduct the tax and to retain it for his own benefit—if the amount paid has been provided out of profits and gains brought into charge by him; while if payment is not made out of profits or gains brought into charge, the payer under r. 21 has to render an account of the amount so deducted.

The procedure is for repayment to be made on proof to the satisfaction of the Special Commissioners, and it was introduced to meet the necessities of the times of 1915 and 1917. What is the meaning of: "Where interest payable in the United Kingdom on an advance from a bank . . . . is paid . . . . without deduction of tax"? Does it cover the case of some one to whom no advance was made and who never paid any interest on such advance, but became liable under a separate contract to make good another's default who did not pay interest on the advance to him? I cannot so construe the section.

The sum of 64,482*l.* 16*s.* 8*d.*, including the 1341*l.* 18*s.* 1*d.*, was taken over by Holders as a bulk payment due from them under their contract with the bank. I cannot agree that s. 36 has any application to such a liability and payment. For these reasons in my judgment the appeal must be allowed, and the claim of the respondents for repayment of income tax rejected.

I have been asked by Lawrence L.J. to say that he has read the judgment which I have just delivered and agrees with it.

Romer L.J. From the facts of this case there emerges the following question of law: Did the respondents pay to the bank any interest on an advance from the bank within the meaning of s. 36, sub-s. 1, of the Income Tax Act, 1918? It is contended by the Crown that they did not, and for two reasons. It is said in the first place that the balances which were debited to Blumfield, Ld., in the books of the bank half-yearly on June 30 and December 31, and on which simple interest was charged for the ensuing six months, consisted, as between the bank and the company, entirely of capital; in other words, that the bank is to be treated as having made an advance to the company at the end of each half-year of the sum necessary for payment of the interest accruing during that half-year, thus discharging the bank's claim to that interest and increasing the company's capital indebtedness by a corresponding amount. In the second place it is said on behalf of the Crown that whether this be so or not, yet as between the bank and the respondents the latter paid nothing as interest, but merely paid a principal sum of 64,482*l.* 16*s.* 8*d.*, which in the events that had happened they had covenanted to pay to the bank.

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If the Crown be right in this second contention, the appeal must succeed altogether. If it be wrong in this contention, but right in the first one, the appeal will succeed, except as to the interest charged from June 30 to November 17, 1926.

As to the first of these two contentions, it is to be observed that the relations between the company and the bank were regulated, not by any special agreement, but by the ordinary usage prevailing between bankers and their customers as to the method ot keeping accounts. In accordance with this usuage the balance of principal and interest was struck at the end of each half-year and the aggregate sum was introduced as the first item in the subsequent half-yearly account and interest calculated upon it. It was in fact the very method of keeping accounts that was considered by Manners L.C. in the case of *Lord Clancarty* v. *Latouche* (1), except that there the balances were struck yearly and not half-yearly. The result of this method of keeping the accounts is, of course, to charge the customer with compound interest, and the question that had to be considered in *Lord Clancarty* v. *Latouche* (1) was as to the legality of such a charge. Now it had been laid down by Lord Eldon in the case of *Ex parte Bevan* (2), that a contract to allow the charging of compound interest was bad. That was because such a contract was usurious. "It is clear," said Lord Eldon (3), "you cannot a priori agree to let a man have money for twelve months, settling the balance at the end of six months; and that the interest shall carry interest for the subsequent six months; that is, you cannot contract for more than 5 per cent.; agreeing to forbear for six months. But, if you agree to settle accounts at the end of six months, that not being part of the prior contract, and then stipulate, that you will forbear for six months upon those terms, that is legal. So this is legal between merchants; where there is no agreement to lend to either; but they stipulate for mutual transactions; each making advances; and that, if at the end of six months the balance is with A., he will lend to B.; and vice versa."

(1) 1 B. & B. 420. (2) 9 Ves. 223. (3) 9 Ves. 224.

This in effect was a decision that, though an agreement for charging compound interest was illegal as being usurious, it was not illegal for the parties to strike a balance at any particular time without any antecedent agreement to do so, and then agree that such balance should continue on loan at interest for a further period.

It was by reason of this principle that Manners L.C. in *Lord Clancarty* v. *Latouche* (1) was able to allow the charge of compound interest. He said this (2): "From the acquiescence of Mr. Connolly I ought to presume an agreement at the end of every year, that the interest then due should become principal and carry interest, which according to *Ex parte Bevan* (3) this Court will admit of."

A similar view of the effect of this method of keeping bankers' accounts was taken in the later case of *Eaton* v. *Bell.* (4) The effect was there described as converting the interest from time to time into capital.

In the case of *Reddie* v. *Williamson* (5) decided by the Court of Session in 1863, the same view prevailed. As that case bears a curious resemblance to the present one it is desirable to allude shortly to the facts with which the Court of Session had to deal. A bank had, in effect, agreed to allow a customer an overdraft not exceeding 400*l.* upon the guarantee of three other persons. The customer drew upon the account, but without the consent of the guarantors was allowed by the bank to exceed the limit of 400*l.* The account was not operated upon after May 30, 1849, at which time there was a balance of over 800*l.* standing to the customer's debit. The account had been kept in the same way as the company's account in the present case, except that the balances were struck yearly instead of half-yearly. The balance of 800*l.* consisted therefore of the advances made to the customer and of compound interest on those advances. Now the guarantors were admittedly liable to pay to the bank advances made up to 400*l.* and interest upon those advances. It was nevertheless held that the 800*l.* was to be treated as consisting wholly of capital and that the guarantors were accordingly only liable for 400*l.* with interest thereon from May 30, 1849. In giving judgment, Lord Inglis, after stating how the account had been kept, said this: "Where an account is kept in this way the interest thus accumulated with principal at the end of each year not only becomes principal, but never thereafter ceases to be dealt with as principal." Then, after pointing out that the bank could have demanded from the guarantors at the end of each year interest upon advances made up to 400*l.*, he said that if the bank, instead of demanding that interest, chose to accumulate it with the capital, they were dealing with the account, so far as the guarantors were concerned, in precisely the same way as if the customer had given the bank a cheque upon the account for the amount in question with which the bank extinguished the interest and then placed the amount of the cheque to the debit of the account as an ordinary draft. Lord Cowan in his judgment said (1): "The true view is, that the periodical interest at the end of each year is a debt to be then paid, and which must be held to have been paid when placed to the debit of the account as an additional advance by the bank." With these observations I desire to express my respectful concurrence.

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(1) 1 B. & B. 420.
(2) Ibid. 429.
(3) 9 Ves. 223.
(4) 5 B. & Ald. 34.
(5) 1 Macph. 228.

I am therefore of opinion that, having regard to the method in which, with the concurrence of the company, the account was kept by the bank, the company must be deemed to have paid each half-year the accruing interest by means of an advance made for that purpose by the bank to the company.

It is true that the reason that originally induced the banks to keep accounts in this way has disappeared with the repeal of the usury laws. But that repeal cannot, as it seems to me, have changed the nature and effect of accounts that continue to be kept in the same way as before.

Upon this part of the case I only desire to add this. Cases such as that of *In re Morris* (2), are in no way in conflict

(1) 1 Macph. 238.

(2) [1922] 1 Ch. 126.

with the conclusion to which I have come. In that case the mortgagors were not personally liable to pay interest on the capital sum advanced and there was an express contract which was good in law that as from the death of the lunatic that sum was to carry compound interest. It was therefore quite impossible, and in any case unnecessary, to regard the insurance company as making advances from time to time to the mortgagors to enable them to pay the interest. The case has no bearing upon the present one in which there is no express contract between the parties, in which the bank could have sued the company for the interest each half-year, and in which the account is kept in a way devised by banks at a time when it was necessary owing to the usury laws to treat them as making such advances.

Having arrived at the conclusion, for the reasons I have indicated, that the money due from the company to the bank at the time the respondents were called upon to fulfil their obligations under the guarantees, consisted entirely of principal with the exception of the sum of 1341*l.* 18*s.* 1*d.* due for interest from June 30 to November 17, 1926, I must now consider the question whether even to that extent the respondents can truly be said to have paid interest to the bank. In my opinion they cannot. What they paid to the bank was the debt due from them under the guarantees. The debt became due, no doubt, because the company had failed to discharge its own indebtedness to the bank, and part of that indebtedness consisted of interest. But the respondents owed no interest to the bank. As I read the guarantees the respondents agreed to pay all sums of money at any time owing to the bank by the company on any account regardless of what that account might be. They were in no way concerned with the origin of the various items going to make up the company's indebtedness, and cannot in my opinion be regarded as being the bank's debtors in respect of each of those items. Supposing, for instance, the company had been tenants of the bank, and arrears of rent had been debited to the company in the account, it would not be accurate to say that the guarantors owed rent to the bank, or that when they discharged their liability under the guarantees they had paid the bank rent for the demised premises. They would merely have paid to the bank, with other money, a sum equal to the amount that the company should have paid to the bank for rent, which sum had become payable by them because the rent had not in fact been paid by the company. To return to the present case, the respondents did not pay the bank the sum of 1341*l.* 18*s.* 1*d.* because they owed the bank any interest. They paid it because they owed the bank that sum by reason of the company's failure to pay interest. It was on similar reasoning that the case of *Parr's Banking Co.* v. *Yates* (1) appears to have been decided. If in that case the guarantor's liability to pay the sums that were charged to the principal debtor for interest accruing within six years of action brought was truly a liability to pay interest on the moneys advanced to the principal debtor, the guarantor was entitled to judgment, because his liability to pay the moneys advanced was barred by the Statute of Limitations and his liability to pay interest thereon would have been barred also. He was, however, held liable to pay the sums so charged for interest, and this must have been on the footing that he had agreed to pay the bank sums equal to the interest charged in the event, which had happened, of the principal debtor failing to do so.

For most practical purposes the debt due from the company and the debt due from the respondent guarantors may be regarded as one and the same. But in fact and in law I think that they are different. I am not therefore prepared to come to the conclusion that the respondents have paid the bank any interest on an advance from the bank within the meaning of s. 36, sub-s. 1, of the Income Tax Act, 1918.

For these reasons I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Peacock & Goddard, agents for Shakespeare & Vernon, Birmingham.*

H. C. G.

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(1) [1898] 2 Q. B. 460.

PENTON *v.* SOUTHERN RAILWAY.

1931
Jan. 15.

Railway—Accident to Passenger—Negligence of Railway Company—Cheap Ticket — Condition negativing Company's Liability — Reasonable Notice of Condition.

The defendants, a railway company, issued to persons asking for tickets between certain hours of the day between certain stations return day tickets at a reduced rate, whether such rate was demanded or not. On the front of these tickets were the words, legibly and clearly printed in large letters, "For conditions see back," and on the back was printed a condition exonerating the company from liability for injury to the holder of the ticket, however caused. The plaintiff asked for "Waterloo return," and was supplied with one of these tickets, which he accepted without objection. He was injured on the journey through the alleged negligence of the defendants' servants :—

Held, that in the absence of proof that the plaintiff actually knew of this condition, the defendants must show that they had taken reasonable steps to bring it to his notice, but that on the facts there was no evidence for a jury that they had not done so.

APPEAL from Southwark County Court.

The following statement of facts is taken substantially from the judgment of Swift J., who adopted the statement of the facts as set out by the county court judge.

The defendants the Southern Railway Co. have for some time past been issuing at certain of their suburban railway stations daily return tickets to London at very greatly reduced fares—that is to say, at fares which are much below the amounts which they are entitled by statute to charge to the passengers on their railway. These tickets are issued every week-day between the hours of 10 A.M. and 4 P.M., and are available, on the up journey, by any ordinary passenger train between those hours, and on the return journey by any ordinary passenger train up to midnight. Any one applying for a return ticket before 10 A.M. or after 4 P.M. is charged a higher rate ; but any one asking for a return ticket to one of the London stations between those hours is given one of the cheaper tickets as a matter of course unless he expressly states that he is not returning the same day. On October 10, 1929, the plaintiff, Charles Bailey Penton, who is an old and rather infirm man, went to Earlsfield station and (according to his own evidence) asked for a "Waterloo return," and was given one of these tickets. The ticket so issued had legibly and clearly printed in large letters on the face of it the words, "For conditions see back," and on the back was printed a notice in these terms: "This ticket is issued subject . . . . (*c*) to the special condition that neither the holder nor any other person shall have any right of action against the company . . . . in respect of (*a*) injury . . . . however caused." The plaintiff stated in his evidence that he did not read what was on the ticket, and did not know that it contained conditions; but he admitted in cross-examination that he knew he was getting a ticket for much less than he expected to have to pay for it. Having taken the ticket the plaintiff entered the train and, on arriving at Waterloo, met with an accident, the exact cause of which is in dispute, and thereby sustained the injuries for which he claims compensation. The case was tried with a jury, which was unable to agree. The defendants then submitted that judgment should be entered for them on the ground that there was no material upon which the jury could return a verdict in favour of the plaintiff. The county court judge refused to so enter judgment.

The defendants appealed.

Henn Collins for the defendants. The county court judge was wrong in refusing to enter judgment for the defendants. The cases on this subject are summarized in *Nunan* v. *Southern Ry. Co.* (1), which was approved by the Court of Appeal in *Thompson* v. *London, Midland and Scottish Ry. Co.* (2) Where there is a transaction which by ordinary practice is formed by the delivery of a document by one party to the other, as in the present case, that delivery is an offer, and the acceptance of the document without objection constitutes the contract as setting out the real intentions of both parties. This is subject to exceptions (3), where the document issued is in the circumstances

(1) [1923] 2 K. B. 703.

(2) [1930] 1 K. B. 41.

(3) For the limits of such exceptions see *Parker* v. *S. E. R. Co.* (1877) 2 C. P. D. 416, in addition to later references in following notes.

such that the recipient might reasonably suppose that it contained no conditions, and the document therefore does not really set out the intentions of the parties. Assuming that to be the case here, the defendants must show either that the plaintiff was aware of the condition or that they had taken reasonable steps to bring it to his notice: *Nunan* v. *Southern Ry. Co.* (1) The plaintiff says he did not in fact know of the condition. The defendants could not have done more than they did to bring that condition to the plaintiff's notice. Had they done so orally, assuming that to be practicable, it would probably only have caused confusion. The county court judge wrongly directed himself to the ascertainment of what was in the plaintiff's mind. This case is really covered by *Thompson* v. *London, Midland and Scottish Ry. Co.* (2) The county court judge distinguished that case by saying that the train there was an excursion train, so that the passenger ought to have expected some conditions to be attached, but there is no substantial difference between the two cases. This is really a stronger case, because the condition is actually printed on the ticket, while in *Thompson's* case (2) reference was made to handbills and time tables. When the plaintiff received this ticket, if he did not wish to avail himself of its advantages, he should have said, " No, this is not the contract I wish to make with you; I want one which will confer on me the advantages belonging to the ordinary ticket."

[*Watkins* v. *Rymill* (3) was also referred to.]

J. G. Paterson for the plaintiff. The case is not covered by *Thompson* v. *London, Midland and Scottish Ry. Co.* (2); that was a peculiar case, where it would be obvious to the traveller that the contract would be subject to some conditions. Here the plaintiff simply said: " Waterloo return." A ticket was placed before him, and he took it up. He received more change than he expected, but that fact was not sufficient to make him suppose that special conditions attached, because everybody who asked for a ticket in these terms

(1) [1923] 2 K. B. 703.
(2) [1930] 1 K. B. 41.
(3) (1883) 10 Q. B. D. 178, 188.

got a cheap ticket whether he expected it or not. And the smallness of the change might be due to a reduction by the company of their normal fares, or to a mistake of the booking clerk. It would be reasonable therefore for the plaintiff to assume that no special conditions attached. In any case it was a question for the jury whether there were any circumstances which would call the attention of the plaintiff to the fact that there were special conditions; it was a question of evidence: *Henderson* v. *Stevenson.* (1)

[SWIFT J. But in that case there was nothing on the ticket to draw attention to the fact that there was a condition on the back.]

The plaintiff was not taking a ticket for a long and complicated journey, but for one of a few minutes only, and could not be expected to examine carefully to see if he was getting all the rights which the law gave him: see per Lord Haldane in *Hood* v. *Anchor Line.* (2)

[SWIFT J. referred also to *Burke* v. *South Eastern Ry. Co.* (3)]

No reply was called for.

SWIFT J. This is an appeal from a decision of his Honour Judge Moore in a case which was tried at Southwark County Court. The action was brought by Mr. Charles Bailey Penton against the Southern Railway, in which he claimed damages for personal injuries which he alleged he had sustained through the negligence of the defendants' servants; and the defendants, among other defences, alleged that the plaintiff was carried by them as a passenger under the terms of a contract under which they were not answerable to him in damages for personal injuries however those injuries might have been caused. The case was tried by the learned judge with a jury, and at the end of the plaintiff's case it was submitted by counsel for the defendants that there was no case to go to the jury on the ground that the contract between the plaintiff and the defendants exonerated the defendants from any liability to the plaintiff. The learned judge, quite properly, decided that whatever might be the decision which he should ultimately give upon that

(1) (1875) L. R. 2 H.L. Sc. 470, 480. (2) [1918] A. C. 837, 845.
(3) (1879) 5 C. P. D. 1.

contention, it was better that he should take the verdict of the jury, and the case was accordingly tried out. Ultimately the jury were unable to agree, and they were discharged without returning any verdict. It was thereupon submitted by Mr. Denning, who appeared with Mr. Henn Collins for the defendants, that judgment ought to be entered for the defendants on the ground that, on the evidence for the plaintiff and for the defendants, it was clear that there was no material upon which the jury could find a verdict adverse to the defendants. The learned judge did not take that view. In a very full and carefully expressed judgment he has given his reasons for coming to the conclusion that there was matter to be submitted to the jury, and he refused to enter judgment for the defendants. From that refusal this appeal is brought, and this Court has now to determine whether, on the facts as they were proved at the trial, taking the most favourable view of those facts for the plaintiff, and assuming everything which the plaintiff alleged in his favour to have been proved in his favour, the jury could have come to a conclusion in favour of the plaintiff, or whether judgment ought to be entered for the defendants.

The facts of the case as detailed in the evidence and as set out by the learned county court judge, from whose judgment I take them, are as follows: [His Lordship stated the facts as set out above.] Those are the facts as they appeared to the learned county court judge to be established by the plaintiff's evidence, and it is upon that state of facts that we are now asked to enter judgment for the defendants. The defendants contended in the county court that having accepted the ticket the plaintiff was bound by the condition printed on it whether he did or did not read it, whether he did or did not know of the condition, and whether he did or did not have notice that the ticket was a special ticket issued subject to special conditions. For the plaintiff it was contended that in order to escape liability the railway company must prove to the satisfaction of the jury, either that the plaintiff was aware of the condition or that the company took all reasonable steps to bring it to his notice.

There have been a very great many cases dealing with the question what has to be established where a contract between parties is made by one of the parties handing to the other a printed form, or a form partly printed and partly in writing, which contains the various conditions. I do not propose to go through all those cases again. The effect of them seems to me to be quite clearly stated in the judgment of the Court of Appeal in *Thompson* v. *London, Midland and Scottish Ry. Co.* (1) In that case Lord Hanworth M.R. laid down the law as it has been summarized in *Nunan* v. *Southern Ry. Co.* (2) He said (3): "It appears to me that the right way of considering such notices is put by Swift J. in *Nunan* v. *Southern Ry. Co.* (2) After referring to a number of cases which have been dealt with in the Courts he [Swift J.] says: 'I am of opinion that the proper method of considering such a matter is to proceed upon the assumption that where a contract is made by the delivery, by one of the contracting parties to the other, of a document in a common form stating the terms upon which the person delivering it will enter into the proposed contract, such a form constitutes the offer of the party who tenders it, and if the form is accepted without objection by the person to whom it is tendered this person is as a general rule bound by its contents and his act amounts to an acceptance of the offer to him whether he reads the document or otherwise informs himself of its contents or not, and the conditions contained in the document are binding upon him.'" Then the Master of the Rolls went on to say: "In law it seems to me that that is right. The railway company is to be treated as having made an offer to intending travellers that if they will accept the conditions on which the railway company make the offer they can be taken at suitable times, on suitable days and by indicated trains from Darwen to Manchester and back at a price largely reduced from the common price; but upon certain conditions which can be ascertained, and of the existence of which there can be no doubt, for they are indicated clearly upon the ticket which is issued."

(1) [1930] 1 K. B. 41.
(2) [1923] 2 K. B. 703, 707.
(3) [1930] 1 K. B. 47.

In this case Mr. Paterson, appearing on behalf of the plaintiff before the learned county court judge, stated, as one knows that he would state, with great lucidity and with perfect accuracy, the law with regard to this matter, and it is set out by the learned county court judge, where he says: "Counsel for the plaintiff contends that, in order to escape liability, the railway company must prove to the satisfaction of the jury either that the plaintiff was aware of the condition or that the company took all reasonable steps to bring it to his notice."

Now we will assume, or at least I am prepared to assume for the purposes of my decision in this case, that it is not proved that the plaintiff was aware of the condition on the back of the ticket. In saying that he was not aware of it I mean that it is not to be imputed to him that he did know. It may well be that a man may be taken to be obliged to know what is in a document, although in truth he may never have read it. Let us assume, putting this case as highly against the defendants as one would be justified in putting it, and putting it as favourably to the plaintiff as one possibly could put it, that he not only did not know what was on the ticket, but that he was under no obligation to know it. Then the question arises, have the railway company taken all reasonable steps to bring it to his notice? In truth, what had happened was that the railway company had given him a ticket. The most obvious matter upon the front of the ticket was the statement that for the conditions one must see the back. The words, "For conditions see back," are certainly plainly visible words upon the front of the ticket. They are as clear to my eye as are the names of the places between which the ticket is issued, and more clear than anything else, and it is impossible to imagine anybody taking that ticket and looking at it, and able to read, who could not see that for the conditions upon which the ticket is issued to him he is to look at the back. When one looks at the back of the ticket one finds the statement: "This ticket is issued subject (*a*) to the company's by-laws (*b*) to the regulations and conditions stated in their time tables, bills and notices and in the railway companies' book of regulations, and (*c*) to the special condition that neither the holder nor any other person shall have any right of action against the company or any other railway company or person owning, working or using any railway vehicles, vessels or premises (whether jointly with the company or otherwise) upon which such tickets may be available in respect of (*a*) injury (fatal or otherwise), loss, damage or delay to property however caused." Therefore one finds on the back of the ticket expressly printed the condition upon which the railway company rely in this case.

Now, giving that document to an ordinary grown-up man, who presumably can read, what more could the company reasonably do in order to bring the condition to his notice ? I confess that I cannot conceive anything more that they could do. They might have done something different ; instead of printing on the face of the ticket, " For conditions see back," they might have said to the plaintiff, " Look at the back of the ticket as well as the front," and then it might have been said that that was not enough, but that they ought to have printed on it something about the conditions he would find on the back. Is there anything which it can be suggested that the railway company should, as reasonable people, have done more than they did do ? I am unable to find anything, and I am supported in that view by Lawrence L.J. in *Thompson* v. *London, Midland and Scottish Ry. Co.*, where he said (1) : " On the ticket issued to the plaintiff's agent there was a statement in plain terms that it was issued subject to conditions which would be found on the back, and on the back there is a plain statement indicating where the conditions subject to which the ticket was issued were to be found. In these circumstances (the notice on the ticket not being tricky or illusory) it seems to me that there is no room for any evidence that the company had not done all that was reasonably necessary as a matter of ordinary practice to call attention to the conditions upon which the ticket was issued."

(1) [1930] 1 K. B. 41, 52.

I think that that is the position here. If the railway company has done one thing, it is not difficult to find something else and to say that they ought to have done that. If they have printed the reference to the conditions on the ticket, it is easy to say, "They ought to have verbally called attention to them." If they had verbally called attention to them it would be quite easy to say, "They ought to have printed them on the ticket." But is there in truth, in ordinary common sense, anything more that the defendants could have done? In my view there is not. I think that they showed that they had done everything which was reasonably necessary, and if the jury had found that the railway company had failed to do something which they reasonably should have done, the verdict would have been set aside upon the ground that there was no material upon which they could have come to such a conclusion. Under those circumstances I think that the learned judge was wrong in refusing to accede to the request of the defendants, that judgment should be entered for them notwithstanding the fact that the jury could not agree.

The learned judge has sought to distinguish *Thompson's* case (1) from the present case. I do not doubt that it may be distinguishable as to some of its facts. It is perfectly true that in that case the train in which the plaintiff had travelled was an excursion train, and it may be that some considerations of fact are different in the case of an excursion train from those in the case of an ordinary train, but I am quite clear that there is no distinction which it is possible to draw as to the principle of law which is to be applied to the facts of these two cases, which principle is the same in both. That principle is as I have quoted it from the judgments of Lord Hanworth M.R. (2) and Lawrence L.J. (3) In my view, applying that principle and relying on that case, which is merely the summary of the almost innumerable cases which have gone before, the result is clear; that in this case a verdict for the plaintiff would have been wrong and could not have

(1) [1930] 1 K. B. 41.

(2) [1930] 1 K. B. 47.

(3) [1930] 1 K. B. 52.

been supported, and that the learned county court judge ought to have entered judgment for the defendants. The appeal is allowed.

MACNAGHTEN J. I am of the same opinion. The plaintiff claimed damages against the railway company for injuries sustained by him in consequence of the alleged negligence of the servants of the company. The special condition indorsed upon the ticket which was issued to and accepted by the plaintiff exempted the railway company from all liability in respect of such negligence, and the question therefore arose whether or not the plaintiff was bound by that condition.

In order to establish that he was so bound the railway company had to prove either (1.) that the plaintiff when he accepted the ticket knew of the condition or (2.) that everything reasonably necessary to bring the condition to his notice had been done. In my opinion there was no evidence on which the jury could properly come to the conclusion that the railway company had failed to do all that was reasonably necessary to bring the condition to the notice of the plaintiff; and in these circumstances the learned county court judge ought to have entered judgment for the defendants.

Appeal allowed.

Solicitor for appellants: *W. Bishop.*
Solicitor for respondent: *R. Compton Bishop.*

W. L. L. B.

MILLER v. CANNON HILL ESTATES, LIMITED.

1931
Jan. 19, 20.

Vendor and Purchaser—House to be Built—Building Estate—Agreement for Sale—Implied Warranty—Collateral Agreement—Surveyor's Certificate—"Fit for Habitation."

In a contract with builders or with the owners of a building estate for the purchase of a house to be erected or in course of erection, there is an implied warranty by the vendors that the house shall be built in an efficient and workmanlike manner and of proper materials, and that it shall be fit for habitation.

Lawrence v. *Cassel* [1930] 2 K. B. 83 followed.

A representation by builders in conversation with a prospective buyer, that all houses on the estate are of the best material and workmanship, may amount to a warranty collateral to a subsequent formal contract, for breach of which an action will lie.

De Lassalle v. *Guildford* [1901] 2 K. B. 215 followed on this point.

APPEAL from the Mayor's and City of London Court.

In January, 1928, the plaintiff, who was in search of a house for himself and his wife, went to see a building estate then being developed by the defendants, who were builders and contractors, at Cannon Hill, Raynes Park, in the county of Surrey. On January 28 they saw the sales manager and the secretary at the defendants' estate office at Raynes Park, who assured the plaintiff that the "material and workmanship" used and employed in the construction of the houses were "of the best."

The plaintiff and his wife had previously visited a completed show house on the estate, and received a prospectus of the estate issued by the defendants. On February 2 the plaintiff again visited the estate and took an option to purchase a site on "plot 8, Cannon Close." On February 14 the plaintiff paid a deposit for this site and on March 6, 1928, entered into a formal contract for the purchase of the plot and house thereon, although the house was in fact then only in course of erection. By this agreement the defendants contracted to sell to the plaintiff a freehold plot of land with the messuage erected thereon and known as plot 8, Cannon Close, Raynes Park, S.W. 20, and delineated on a plan annexed, for 915*l*. The purchase was to be completed on

June 29, 1928, and the property was to be registered with an absolute title under the Land Registration Act, 1925.

The agreement provided (clause 7): "The interior of the house shall be finished off similar to the Show House No. 66 Fairway, Raynes Park, S.W. 20, and the company will furnish and complete the same to the purchasers reasonable satisfaction . . . ." and (clause 9) "the company will obtain and hand over on completion the certificate of the local authority that the house is fit for habitation."

The sale was for an estate in fee simple in possession free from encumbrances other than the stipulations as to building and user contained in the contract. These stipulations were not material to the present case.

On May 8, 1928, the local surveyor certified the house as fit for human habitation. The house was finished towards the end of July, 1928, and the purchase was completed on August 2, 1928.

The plaintiff and his wife went into occupation in September and lived there until February, 1930. During 1929 the weather was abnormally wet, and serious damp penetrated the house during the winter 1929–30. The plaintiff, acting on medical advice, left the house as being unfit to live in, and in February, 1930, a local sanitary inspector being called in served on the plaintiff a notice to abate the nuisance caused by damp.

In January, 1930, the plaintiff brought this action for damages 100*l.* for breach of contract. The plaintiff relied (*a*) on the verbal representation made to the plaintiff by the defendants at their estate office on January 28, 1928, as to the materials and workmanship to be used and upon the written contract dated March 8, 1928, and (*b*) alternatively, upon an implied warranty by the defendants that they would complete the house in a good and workmanlike manner with materials of good quality and description so as to be fit for habitation.

The defendants in their defence pleaded that the contract was concluded by the written agreement dated March 6, 1928, duly completed by instrument of transfer under the

Land Registration Act, 1925, upon August 2, 1928; that the local surveyor had certified the premises as fit for habitation; that in so far as there were any defects they were due to abnormally wet weather; and that the plaintiff inspected the premises between February and August, 1928, and that he bought the house relying on his own judgment.

The action was tried by his Honour Judge Shewell Cooper and a jury, and in answer to questions by the learned judge the jury found: (1.) that there was an oral agreement made in conversations between the parties before March 6, 1928; (2.) that the house was not fit for habitation on August 2, 1928, or on January 14, 1930; (3.) that the defects were due to faulty construction accelerated by abnormal weather; (4.) that the house would not have been reasonably fit for habitation apart from the abnormal weather. They awarded 91*l.* damages.

After argument the learned judge held upon these findings that there was an express warranty by the defendants, and that there was evidence upon which the jury could so find. He gave judgment for the plaintiff for 91*l.*

The defendants appealed on the ground that the judge was wrong in law in leaving to the jury the question of the construction and effect of the alleged agreement and warranty of January 28, 1928: and that the judge failed to direct the jury that there was no contract that the house was or would be fit for human habitation.

W. H. Moresby for the defendants. As to the defendants' representations before the contract, the manager's statement as to the material and construction of the house did not amount to a warranty. The words were not used or intended or understood to be used contractually and cannot be so construed; *Heilbut, Symons & Co.* v. *Buckleton.* (1) They were at most an innocent misrepresentation as to the houses on the estate, and that is not here alleged. Nothing outside the written contract was here intended, and cases leading up to and concluding with *De Lassalle* v. *Guildford* (2) do not apply. Secondly, if the contract was only a contract for the sale of a house, as we contend, the maxim "caveat emptor" applies and there is no implied warranty: Williams on Vendor and Purchaser, 3rd ed., vol. ii., p. 752. If, however, there are here two contracts (*a*) to build a house, (*b*) to sell a completed house, the question of an implied warranty does arise: *Lawrence* v. *Cassel.* (1) That case can be distinguished, because here there is no antecedent contract, as in *Lawrence* v. *Cassel* (1), but only a general conversation with a vendor who is praising the goods which he has to sell. Furthermore there are limitations expressed in the formal contract—namely, that the defendants shall obtain the surveyor's certificate that the house is fit for habitation, and that the interior shall be finished off "similar to the Show House."

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(1) [1913] A. C. 30, 50.

(2) [1901] 2 K. B. 215.

Sir Thomas Hughes K.C. and *G. J. Paull* for the plaintiff. There was here, as the jury found, an express warranty collateral to the main agreement to build and sell. Alternatively, the contract was to build a house "fit for habitation." In the Court below the judge decided the case on the ground of express warranty that the materials and work were "of the best." Such a statement is collateral to the contract itself, which contains no reference to materials: *Morgan* v. *Griffith* (2); *Erskine* v. *Adeane* (3); *De Lassalle* v. *Guildford.* (4) These cases were discussed by the Court of Appeal in *Heilbut, Symons & Co.* v. *Buckleton.* (5) In *De Lassalle* v. *Guildford* (4) the Court of Appeal declared that the decisive test as to a representation amounting to a warranty is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and in which the buyer may be expected also to have an opinion and to exercise his judgment. Lord Moulton in *Heilbut, Symons & Co.* v. *Buckleton* (5) says that the words "decisive test" in that judgment cannot be defended and that the features

(1) [1930] 2 K. B. 83.
(2) (1871) L. R. 6 Ex. 70.
(3) (1873) L. R. 8 Ch. 756.
(4) [1901] 2 K. B. 215.
(5) [1913] A. C. 30, 50.

referred to are only criteria of value. The intention of the parties can only be deduced from the evidence as a whole. But apart from this criticism, which does not detract from the general value of that decision, those cases are unchallenged as recognizing the legality of a collateral warranty outside the written contract.

If one looks at this contract as the sale of a house, the contract here imports building and completing the house. In *Lawrence* v. *Cassel* (1) the Court of Appeal accepted the view that on the sale of a house which is to be built, there is an implied warranty that the house shall be fit for human habitation. This is an illustration of the implication which the law raises from the presumed intention of the parties, with the object of giving the transaction the efficacy which the parties intended: *The Moorcock.* (2) The implication which here arises from the intention of the parties is that the house should be fit for human habitation.

Moresby in reply. The doctrine referred to in *The Moorcock* (2) has never been applied to a written contract for the purchase of a house.

SWIFT J. [after stating the facts and referring to the questions put to the jury and their answers :] The effect of those answers clearly is that the jury found that there was a warranty that the material and workmanship to be used and employed on the house should be of the best; they also found that the house was not reasonably fit for habitation, and that it was not reasonably fit for habitation in normal weather, and that the plaintiff had sustained damages to the extent of 91*l.* in consequence of that breach of warranty. No question arises before us as to the jury's finding in fact that the house was not reasonably fit for habitation, or as to the damage which the plaintiff had thereby sustained; but it is argued on behalf of the defendants that there is no express warranty upon which damages could be awarded for the breach of warranty if the house was not fit for habitation, and that there is no implied warranty in the circumstances of this case that the house should be fit for habitation.

(1) [1930] 2 K. B. 83.

(2) (1889) 14 P. D. 64.

With regard to the first of these points, Mr. Moresby bases his contention that there was no warranty upon two grounds. He says, firstly, that the words which are alleged to amount to a warranty and which the jury have said amount to a warranty are capable of being a warranty; secondly, if they are capable of being held to be a warranty, the jury in this particular case ought not to have found that they were a warranty; that they did not in fact amount to a warranty even if they were capable in law of being so held. With regard to the implied warranty, he says that in the circumstances of this case there is no implied warranty, and therefore there being no express warranty and there being no implied warranty, that even if this house were not fit for habitation, as the jury has found, the plaintiff is not entitled to any damages in respect of that.

In considering those arguments we must ascertain what was the language which the jury found to have been used and to amount to a contract before we can determine whether in that language there could, as a matter of law, be found material upon which the jury might say that there was a contract; and if there were material upon which a jury might say there was a contract, whether they ought in this particular case to have done so. That is to say, it is necessary to decide not only whether there were words which were capable of forming a contract, but whether in fact they were intended by the parties to form a contract and did form a contract.

Is this promise that the house would be constructed of the best material, which was given at an interview some time before the final contract, capable of being held by a jury to amount to a contract? I think that it is. Whether it does amount to a contract or not is a different matter, but that as a matter of law it is capable of forming the basis of a contract I can have no doubt. Here are two people bargaining with the representatives of the defendants as to the erection of a house; there are many qualities of material of which a house may be built; they do not know them all, but they know, at any rate, that there is good material and bad material.

They asked as a preliminary to ordering the house and as the foundation for contracting that a house should be built for them, that it should be built of good material, and they were assured that the house would be of good material. This assurance was fortified by a statement of the fact that the local surveyor supervised the work as it was being done, and that it was impossible for him to be deceived about it.

De Lassalle v. *Guildford* (1) is of full authority upon the question of warranty, although a particular passage as to the weight to be attached to certain evidence by a jury may have been inappropriately or too broadly expressed. A. L. Smith M.R. there said in his judgment: "Now in the present case, did the defendant assume to assert a fact, or merely to state an opinion or judgment upon a matter of which he had no special knowledge, and upon which the plaintiff's wife, on behalf of her husband, might be expected also to have an opinion? What is it the defendant asserts? I paraphrase the evidence: 'You need have no certificate of a sanitary inspector; it is quite unnecessary; the drains are in perfect condition. I give you my word upon the subject. Will that satisfy you? If so, hand me over the counterpart.' What more deliberate and emphatic assertion of a fact could well be made during the course of the dealing which led up to the counterpart lease being handed over to the defendant? That the question asked and the answer given were seriously intended, to use the words of Wills J. in *Best* v. *Edwards* (2), to be the basis of the contractual relations between the parties I cannot doubt." It must be borne in mind that when he says "I cannot doubt that they were intended to amount to a contract," he was in a position in which he had to deal with and to find the answer to the questions of fact as well as to lay down the law. He says: "There is the evidence that the plaintiff would not take the lease unless the drains were guaranteed, and surely the statements made by the defendant were not made on the assumption that they were to be of no avail to the plaintiff except they were made fraudulently. In my judgment

(1) [1901] 2 K. B. 215, 221.

(2) (1895) 60 J. P. 9.

everything necessary to establish a warranty has in this case been proved." I am far from saying that that language, in the words of the plaintiff and his witnesses in this case, would necessarily satisfy me as a matter of fact that a warranty had been established. That is not the point which this Court had to consider, but rather whether that language could be held by the jury to amount to a warranty. In my view it clearly could be so held by the jury, having regard to all the circumstances, the position of the plaintiff and his wife and the defendants, the houses they had seen, and the object of their visit, that in truth there was a warranty given by the representatives of the defendants that the best material would be used upon these premises and the best workmanship would be applied to them.

That disposes of the first of the points raised in this case by Mr. Moresby on this appeal, but it by no means disposes of the case. Indeed it seems to me that it is a matter of very little moment whether there was or whether there was not an express warranty as to the condition of the material or the nature of the workmanship which should be used in this house, because I think that it is plain from the whole of the facts of the case that the law will imply a warranty that the house which was to be built by the defendants for the plaintiff should be a house which was habitable and fit for human beings to live in. I think it is quite clear law that if one buys an unfurnished house, there is no implication of law, and there is no implied contract that the house is necessarily fit for human habitation. That must be good sense, because a man who buys an empty house may not necessarily need it as a dwelling-house; he may be buying something which is almost in a state of ruin, knowing that he will have to restore it and pay a considerable amount of money for restoring it. He may buy a house which wants a new roof put on or which has other obvious defects of which he knows, and may have defects of which he does not know, and if he wants to buy a house which is fit for habitation, then he must expressly stipulate that the house shall be fit for habitation. He can always get an express warranty that an unfurnished house is fit for habitation, if he is prepared to pay the price which attaches to an unfurnished house which has such a warranty, rather than the price which a vendor is willing to take for an unfurnished house without such a warranty. The position is quite different when you contract with a builder or with the owners of a building estate in course of development that they shall build a house for you or that you shall buy a house which is then in the course of erection by them. There the whole object, as both parties know, is that there shall be erected a house in which the intended purchaser shall come to live. It is the very nature and essence of the transaction between the parties that he will have a house put up there which is fit for him to come into as a dwelling-house. It is plain that in those circumstances there is an implication of law that the house shall be reasonably fit for the purpose for which it is required, that is for human dwelling. Our attention has been called to the well known passage from the judgment of Bowen L.J. in *The Moorcock* (1) as to the cases in which a warranty will be implied in law. Can the parties here be thought, when the plaintiffs were bargaining for a dwelling-house which was to be erected in accordance with the character of the other dwelling-houses in the neighbourhood, to have been bargaining for something which was no protection in wet weather? The jury have found here that this house was in such a leaking or porous condition that it was quite unfit for human habitation. If the plaintiff has no implied warranty that it shall be fit for human habitation, then the consideration for which he bought this house wholly fails.

The matter is not without recent and, I think, direct and binding authority upon us in the Court of Appeal, in *Lawrence* v. *Cassel*. (2) [His Lordship read the headnote to the report of the case and continued:] What was the agreement between the parties there? So far as it is material to this case it is to be found in clause 4, "The vendor will complete the said dwelling-house in accordance with the plans of other B type houses on the estate and the house will contain sanitary fittings similar in all material particulars to the houses of this type already erected on the estate (as seen in Bentley Road)." There was nothing there about the defendant doing the work in a proper, efficient and workmanlike manner or that the materials used should be fit and proper for the purpose. All that the written agreement specified was that the house should be built, and upon that the Court of Appeal held that such a warranty was rightly implied. Indeed, I do not think that it was ever disputed in the Court of Appeal that the very foundation of the action was that it was implied that the materials used should be suitable and fit and proper for the purpose and that the work should be carried out in a proper, efficient and workmanlike manner. In this particular case the contract that the house shall be completed is not put into writing. The written agreement refers to a house erected, and there is no writing putting upon the defendants the obligation of completing the house, unless it is to be found in clause 7 of the agreement, but it is admitted that the defendants were under a duty (and it must be an implied duty, because it is nowhere expressed) to complete the house, and therefore if they were under an implied duty to complete the house, they are in the same position as if they were under a written agreement to that effect. They are in the same position as the defendants were in *Lawrence* v. *Cassel* (1), although there the duty merely was to complete the house. Upon that agreement the law implies the further agreement that it shall be completed in an efficient and workmanlike manner and of proper materials. Here it is quite clear that there was, quite apart from the express agreement which the jury have found, and were entitled to find, an implied agreement that this house should be completed in an efficient and workmanlike manner, and that proper materials should be used, and the jury were entitled and almost compelled to find that both at the date of the conveyance and at the date when the plaintiff started his action, it was not built of good materials or in a workmanlike manner.

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(1) 14 P. D. 64, 68.

(2) [1930] 2 K. B. 83.

(1) [1930] 2 K. B. 83.

In these circumstances I think that if one looks merely at the question of the express contract there was matter which it was proper to leave for the consideration of the jury, and on that matter the jury might come to the conclusion that there was an express contract. If on the other hand there was no such matter which could properly be left to the jury, then I think that on the undisputed facts as disclosed in this case, there was an implied contract and there was ample evidence of breach either of the oral or the implied contract, and that the jury were justified in their conclusions and that the learned judge acted rightly in entering judgment for the plaintiff, and his judgment ought not to be disturbed.

MACNAGHTEN J. It is not disputed that the written contract dated March 6, 1928, imposed upon the defendants an obligation to complete the house which was then being erected. It may be that clause 7 of the contract which provides that the interior of the house shall be "finished off similar to the Show House," ought on its true construction to be read as including also by necessary implication the exterior parts of the house which were still unfinished. If so, then the house was to be finished both externally and internally to the purchaser's reasonable satisfaction, and it cannot be suggested that the purchaser ought to be reasonably satisfied with a house which was unfit for human habitation. If on the other hand clause 7 only applies to the interior of the house, then there is nothing in the written contract expressing the admitted obligation of the defendants to complete the roof and other external parts of the house. That being so, how should this admitted obligation be expressed if it is put into words? It can hardly be doubted that the obligation of the builder was an obligation to build properly, to build with proper materials, and in a proper manner, and to provide a house fit for the purpose for which, to the knowledge of both parties, the house was required—namely, for the habitation of the plaintiff and his wife. That is to say, it was an implied term between the parties that the defendants should complete the house in a good and workmanlike manner with materials of good quality and description, so as to be fit for habitation. In that view of the matter, the question whether in fact there was an oral collateral warranty that the house should be built of good material and that it should be fit for habitation becomes in my view immaterial. The answer Mr. Moresby makes to this allegation of an implied agreement is that the only obligation imposed on the defendants by the contract was to make a house similar in appearance to the show house, and to obtain a certificate from the district surveyor that it was fit for habitation. The house, says Mr. Moresby, was similar in appearance to the show house and the district surveyor did give a certificate that it was fit for habitation, although having regard to the form of his certificate and the reference made in it to By-law III. of the District Council's By-laws, which deals primarily with the drains, it may be that the certificate was really only intended as a certificate that the house had been properly connected with the public sewer. The surveyor did not appear as a witness to support the certificate that he gave, and therefore there was no opportunity for ascertaining whether he intended to say that this house, which at the time of the trial had been condemned by some other official of the District Council as unfit for occupation, was at the time when he gave it, free from the defects which it was established before the jury to have had throughout. In my view, it being established that the house was not reasonably fit for human habitation at any time, and that this was due to the faulty construction of the house by the defendants, the plaintiff is entitled to recover damages against the defendants, because they failed to carry out their obligation to complete the house in a proper manner, so that it might be fit for the purpose for which both parties knew the house was required—namely, the habitation of the plaintiff and his wife. I therefore think that judgment was rightly entered for the plaintiff.

Appeal dismissed.

Solicitors for the defendants: *Upton, Britton & Lumb.*

Solicitors for the plaintiff: *Sheffield, Powell & Scott Tucker.*

F. P. F.

MORRIS *v.* BRITANNIC ASSURANCE COMPANY, LIMITED.

1931
March 5, 6.

Insurance of Children's Lives—Funeral Expenses—Illegitimate Child—Industrial Assurance Act, 1923 (13 *&* 14 *Geo.* 5), *c.* 8, *s.* 3.

The Industrial Assurance Act, 1923, s. 3, provides that: "Amongst the purposes for which industrial assurance companies may issue policies of assurance, there shall be included insuring money to be paid for the funeral expenses of a parent, child, grand-parent, grandchild, brother or sister, and the issuing of such policies shall be treated as part of the industrial assurance business of the society or company":—

Held, that the word "child" in the above section includes an illegitimate child, and that policies taken out by a mother for the purpose of insuring money to be paid for the funeral expenses on the death of her illegitimate children were valid.

Special Case stated by the Industrial Assurance Commissioner under the Arbitration Act, 1889, s. 7 (*b*), and/or the Industrial Assurance Act, 1923, s. 32, sub-s. 1, applying the Friendly Societies Act, 1896, s. 68.

After stating that the award was made in the form of a Special Case at the request of the assurance company in pursuance of the above Acts, the award of the Industrial Assurance Commissioner proceeded as follows:—

This matter is a dispute referred to me in pursuance of the Industrial Assurance Act, 1923, s. 32, sub-s. 1, by Edith Morris and the Britannic Assurance Company, Ld. (hereinafter called "the company"), which is an industrial assurance company within the meaning of the Industrial Assurance Act, 1923. The said Edith Morris signed proposals with the company for five policies. The number and date of and the name of the life assured by each of the said policies were as follows:—

Number.	Date.	Life Assured.
A. 13336350.	April 28, 1913.	Dorothy Morris.
B. 18020967.	March 22, 1920.	Leonard S. Davis.
C. 19398912.	August 6, 1923.	Dorothy Morris.
D. 19616236.	March 31, 1924.	Diana M. Davis.
E. 20468499.	June 20, 1927.	Marie L. Davis.

Each of the policies is a policy of industrial assurance issued for the purpose of insuring money to be paid for the funeral expenses of the life assured and each of the lives assured is the illegitimate child of Edith Morris. Policies A, B and C were issued before the commencement of the Industrial Assurance Act, 1923—namely, January 1, 1924, and policies D and E after that date.

Edith Morris contends that each of the policies is an illegal policy, on the ground that the company could not issue to the mother of an illegitimate child a policy of industrial assurance on the life of such child for funeral expenses, either at common law or by virtue of the Collecting Societies and Industrial Assurance Companies Act, 1896, s. 13, or under the Industrial Assurance Act, 1923, s. 3. In pursuance of the Industrial Assurance Act, 1923, s. 5, she claims a sum equal to the surrender value of policies A, B and C, and a sum equal to the amount of the premiums paid by her on policies D and E.

The company contends that each of the said policies is legal, as to policies A, B and C at common law and/or by virtue of the Collecting Societies and Industrial Assurance Companies Act, 1896, s. 13, and as to policies D and E at common law and/or under the Industrial Assurance Act, 1923, s. 3, and that therefore the claim of Edith Morris under s. 5 of the Industrial Assurance Act, 1923, ought to be dismissed.

The question for the opinion of the Court is whether the said policies or any of them are or is illegal. If the Court is of opinion that policies A, B or C or any of them are or is illegal, then I award that the company do pay to Edith Morris a sum equal to the surrender value of such policies or policy calculated in accordance with the Industrial Assurance Act, 1923. If the Court is of opinion that policies D and E are illegal then I award that the company do pay to Edith Morris a sum equal to the amount of the premiums paid by her on such policies. If the Court is of opinion that any or all of the said policies is or are legal, then I award that the application of Edith Morris be dismissed as regards such policy or policies.

Blanco White for the company. The Life Assurance Act, 1774, declared life policies to be illegal, where there was no insurable interest in the life of the assured. An insurable interest means some pecuniary loss or liability resulting from the death to the person effecting the policy. The nearest of kin to the deceased is under a legal obligation to bury him or her: Halsbury's Laws of England, vol. iii., "Burial and Cremation," pt. I., sect. 1, para. 851: *Reg.* v. *Stewart* (1); *Reg.* v. *Vann.* (2) In the case of an illegitimate child the obligation is on the mother, who has an insurable interest in the life, because she is liable for funeral expenses. As regards the statutes, the Friendly Societies Act, 1896, s. 8, provided that a society might be registered for the purpose of having money paid on the death of a child of a member. Sect. 62 limited the amount to be paid, and s. 63 limited the class of person to whom it might be paid, while s. 67 removed the limit, where the assured had an insurable interest in the child's life. The Collecting Societies and Industrial Assurance Companies Act, 1896, s. 13, applied these provisions to such societies and companies, including the Britannic Assurance Company here.

The Industrial Assurance Act, 1923, s. 3, which repealed the above Act of 1896, provides that insurance may cover the funeral expenses of a child. The question whether the word "child" includes illegitimate child was discussed in *Woolwich Union* v. *Fulham Parish* (3), where Vaughan Williams L.J. said: "It is of course true that that is only prima facie the meaning to be given to the word, and that a wider meaning may, in the case of some statutes, be given to it so as to include an illegitimate child or illegitimate children, where that meaning is more consonant with the object of the statute." Applying that test to the Industrial Assurance Act, 1923, "child" should include an illegitimate child. The decision of the Court of Appeal in that case (3) was affirmed by the House of Lords, and it was held that in the Poor Removal Act, 1846, s. 1 (proviso), as in many

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(1) (1840) 12 A. & E. 773.

(2) (1851) 21 L. J. (M. C.) 39.

(3) [1906] 2 K. B. 240, 246; [1907] A. C. 255.

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other statutes, "children" includes illegitimate children. The object of the Industrial Assurance Act, 1923, was to prevent financial disaster on death, and s. 3 has this end in view. That section enables a brother or sister to insure for funeral expenses and for that purpose legitimacy or illegitimacy makes no difference. Similarly, no difference can have been intended in the case of a mother insuring her child, whether the child be legitimate or illegitimate.

Harold Murphy for the assured. There is no insurable interest here, and the assured is entitled to the return of the premiums paid. At common law there is no legal obligation on the parent to bury his child: *Clark* v. *London General Omnibus Co.* (1) The duty depends on custody and not on relationship.

The word "child" in legal documents applies to legitimate child only, unless there is an express statement to the contrary. In the Friendly Societies Act, 1896, s. 8, sub-s. 1 (*b*), the word "child" occurs along with the words "husband" and "wife," which suggests that the narrower construction of "child" should prevail. In the Industrial Assurance Act, 1923, there is nothing to show that the wider construction should be adopted.

MACKINNON J. This matter arises upon a Case stated in regard to a claim under the Industrial Assurance Act, 1923, s. 5, the claimant alleging that certain policies which she effected with the Britannic Assurance Company upon the lives of her five children were illegal.

That section provides that "any collecting society or industrial assurance company which issues policies of industrial assurance which are illegal or are not within the legal powers of the society or company shall be held to have made default in complying with the provisions of this Act, and, where any such policy has been issued, the society or company shall, without prejudice to any other penalty, be liable to pay to the owner of the policy" certain moneys varying according to the date of the policy. The claimant says that

(1) [1906] 2 K. B. 648.

she is entitled under that section to those moneys. The question therefore arises whether she has established that these policies were illegal.

The matter goes back to the Life Assurance Act, 1774, which provided that any policy of life assurance should be illegal if the person taking out the policy had not an insurable interest in the life of the assured. An insurable interest means that the person effecting the policy must by the happening of the death of the person insured be likely to sustain some pecuniary loss or liability. Apart from the question whether at common law the claimant in this case had an insurable interest, there are certain provisions with regard to these industrial assurances which lay down the terms or the circumstances in which persons may effect valid policies, thereby declaring that in certain circumstances a person must be deemed to have an insurable interest sufficient to satisfy the statute of 1774. Therefore the question whether these policies were legal in that the claimant had at the time of effecting the policies, or by virtue of these other Acts was deemed to have, an insurable interest, presents a two-fold problem: First, whether the claimant, apart from any statutes, had an insurable interest in the lives of these children at common law; and, secondly, whether by virtue of the terms of these statutes she must be deemed to have such an insurable interest.

Having regard to the view which I take of the provisions of the statutes, it is not necessary for me to decide the first question, and I will at once refer to the provisions of the statutes. These policies were of a familiar type—namely, to provide for the funeral expenses of these insured children, and that type of insurance is one of those recognized by the various Acts to which I must refer. It is provided by the Friendly Societies Act, 1896, s. 8, sub-s. 1, that "the following societies may be registered under this Act: Societies (in this Act called friendly societies) for the purpose of providing by voluntary subscriptions of the members thereof, with or without the aid of donations, for," and then in para. (*b*), "insuring money to be paid on the birth of a member's child, or on the death of a member, or for the funeral expenses of the husband, wife, or child of a member." Those are the relevant words. A woman, of course, can be a member. By the same Act it is provided (s. 62) that there shall be a limitation of the amount payable on the death of the child, and (s. 63) that the society shall not pay any sum on the death of the child, except to the parents of the child.

By the Collecting Societies and Industrial Assurance Companies Act, 1896, it is provided in s. 13, sub-s. 2: "An assurance made, or to be made by an industrial assurance company, of a sum of money payable on the death of the child under the age of ten years, which would be valid if effected with a registered society, shall not be invalidated by reason of any provision contained in the Life Assurance Act, 1774." Sect. 13, sub-s. 1, provides that "the provisions of sections 62 to 67 and section 84 of the Friendly Societies Act, 1896, relating to payments on the death of children, shall extend to industrial assurance companies." There is a further provision in the Assurance Companies Act, 1909, s. 36, sub-s. 1: "Amongst the purposes for which collecting societies and industrial assurance companies may issue policies of assurance there shall be included insuring money to be paid for the funeral expenses of a parent, grand parent, grandchild, brother, or sister."

Those provisions were repealed and further legislative provision with regard to policies of this type was made by the Industrial Assurance Act, 1923, which (s. 3) provides as follows: "Amongst the purposes for which collecting societies and industrial assurance companies may issue policies of assurance there shall be included insuring money to be paid for the funeral expenses of a parent, child," and so on.

The determination of this question depends upon the answer to another question, which is this: Does the word "child" in s. 8, sub-s. 1 (*b*), of the Friendly Societies Act, 1896, and the word "child" in the Act of 1923, s. 3, mean a child born in wedlock, or does it also include a child that is illegitimate? If it does include a child that is illegitimate

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then these policies are all of them legal. If it does not, then, subject to any question that arises on the other branch of the case at common law as to the insurable interest of parents in the funeral expenses of an illegitimate child, they would be illegal. Prima facie I agree that when in legal documents the word "child" is used it means a legitimate child, but no doubt a consideration of the context may require one to give it a wider meaning so as to include both legitimate and illegitimate children.

The proposition to which I referred just now as to the legal construction of the word "child" is laid down sufficiently and succinctly by Vaughan Williams L.J. in a case of a different nature: *Woolwich Union* v. *Fulham Union.* (1) The learned Lord Justice says: "He [the appellants' counsel] relied for the purpose of that argument upon the technical rule of law that the word 'child' or 'children' means a legitimate child or legitimate children, and that meaning must prima facie be given to the word whenever it occurs in a statute. It is, of course, true that that is only prima facie the meaning to be given to the word, and that a wider meaning may, in the case of some statutes, be given to it, so as to include an illegitimate child or illegitimate children, where that meaning is more consonant with the object of the statute."

In this case, as appears from s. 36, sub-s. 1, of the Act of 1909, the object of these statutes is to provide for the funeral expenses to which parents and others are put on the death of children and other relatives. It seems to me that the incidence of those expenses cannot depend upon whether before the birth of the particular child the mother did or did not go through a ceremony in a church or registry office. The nature of the duty or obligation as to which she is desirous of insuring is precisely the same whether the child happens to be legitimate or illegitimate. Having therefore regard to the purpose of the legislation I think the context in these sections does require the word "child" to have the wider meaning, as being more consonant with the object of

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(1) [1906] 2 K. B. 240, 246.

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the statute, and includes an illegitimate child as well as a legitimate child, and that therefore these policies were legal. In these circumstances it is not necessary for me to discuss the interesting but difficult question at common law. I decide this case upon the statutes and hold that these policies were legal.

Solicitors for the company: *Kingsley Wood, Williams & Co.*
Solicitors for the assured: *Wynne-Baxter & Keeble.*

F. P. F.

1930
Dec. 18.

PROSSER *v.* MOUNTAIN ASH URBAN DISTRICT COUNCIL.

Milk—Purveyor of Milk by Retail—Registration—Tenant of Premises used as Dairy—Notice by Local Authority to Tenant to show Cause why Predecessor should not be removed from Register—Decision of Local Authority to remove Predecessor—Ground of Notice and Decision that Premises not fit for Purposes of Dairy—Appeal by Tenant to Court of Summary Jurisdiction—Tenant whether a "person aggrieved"—Jurisdiction of Court—Milk and Dairies (Amendment) Act, 1922 (12 *&* 13 *Geo.* 5, *c.* 54), *s.* 2, *sub-s.* 1*—Milk and Dairies Order,* 1926, *Art.* 6.

On May 1, 1930, the appellant succeeded a predecessor as annual tenant of premises used as a dairy. On May 12, 1930, the respondents, who were the local authority, having in the meantime given a similar notice to his predecessor, gave to the appellant a notice purporting to be given under the Milk and Dairies (Amendment) Act, 1922, s. 2, sub-s. 1, calling upon him to show cause why they should not remove his predecessor from the register of purveyors of milk in respect of the premises on the ground that they were satisfied that by default of the latter the premises were not in a fit condition for the purposes of a dairy. On May 13, 1930, the respondents, after hearing the appellant, decided to remove his predecessor from the register on that ground, and thereupon gave the appellant notice that they had so decided. An appeal by the appellant under the above sub-section against the decision of the respondents was dismissed by the magistrate on the ground that the appellant was not a "person aggrieved" by the decision within the meaning of the sub-section. On an appeal from the magistrate by case stated:—

Held, by the Divisional Court, that the appellant was a "person aggrieved" within the meaning of the sub-section, and that the case should be remitted to the magistrate to be heard by him on the merits.

CASE stated by the stipendiary magistrate for the division of Miskin Higher in the county of Glamorgan.

Gilfach-y-Rhyd Isaf farm, Abercynon, was a dairy subject to the provisions of the Milk and Dairies (Consolidation) Act, 1915, the Milk and Dairies (Amendment) Act, 1922 (1), and the Milk and Dairies Order, 1926. (1) On May 1, 1930, one John Jones Hughes, who had for many years been an annual tenant of the farm, ceased to be tenant, his tenancy being determined by a notice to quit which expired on that date, and vacated the farm. By reason of his tenancy of the farm and of the fact that he sold milk by retail therefrom, his

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(1) Milk and Dairies (Amendment) Act, 1922:—

Sect. 2: "(1.) Any local authority by whom a register of purveyors of milk is kept under or in pursuance of any enactment in that behalf, may, if they are satisfied that the public health is or is likely to be endangered by any act or default of any person who is registered or who seeks to be registered therein as a retail purveyor of milk, in relation to the quality, storage or distribution of milk, serve upon him a notice to appear before them not less than seven days after the date of the notice to show cause why the local authority should not, for reasons to be specified in the notice, refuse to register him or remove him from the register, as the case may be, either absolutely or in respect of any specified premises, and if he fails to show cause to their satisfaction accordingly they may refuse to register him or remove him from the register, as the case may be.

"Any person aggrieved by any such decision of the local authority as aforesaid may, within twenty-one days, give notice of appeal to a court of summary jurisdiction, and that court may require the local authority to register such person or not to remove him from the register.

"The local authority or such person as aforesaid may appeal from the decision of the court of summary jurisdiction to the next practicable court of quarter sessions, who may confirm or reverse the order of the court of summary jurisdiction. . . . ."

Milk and Dairies Order, 1926, dated July 6, 1926, made under the Milk and Dairies (Consolidation) Act, 1915 (5 & 6 Geo. 5, c. 66). . . . .

Part III.—Registration and Notices.

6: "(1.) Every sanitary authority shall keep registers of all persons carrying on in their district the trade of cowkeeper or dairyman and of all farms and other premises within their district which are used as dairies.

"(2.) Subject to the provisions of s. 2 of the Milk and Dairies (Amendment) Act, 1922, or of any other statutory enactment, the sanitary authority, on the application of any person proposing to carry on in their district the trade of cowkeeper or dairyman or to use any farm or other premises in the district as a dairy, shall register such person or such premises.

"(3.) Subject as aforesaid, no person shall carry on the trade of cowkeeper or dairyman or use any premises as a dairy unless he and any such premises are registered in pursuance of this article. . . . ."

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name was entered in the register of retail purveyors of milk kept by the Mountain Ash Urban District Council (hereinafter called "the respondents") as a retail purveyor of milk in respect of the premises at the farm. On May 1, 1930, Mr. David Prosser (hereinafter called "the appellant") succeeded J. J. Hughes as annual tenant of the farm. On the last mentioned date the respondents forwarded by registered post to J. J. Hughes a notice addressed to him at the farm calling upon him to attend before them on May 13, 1930, to show cause why for certain therein specified reasons the respondents should not remove him from that register in respect of the premises.

On May 12, 1930, the appellant received by registered post from the respondents a notice headed with the title of the Act of 1922 and addressed to him at the said farm which stated that: "The Local Authority for the urban district of Mountain Ash, being satisfied that the public health is endangered by the act or default of J. J. Hughes: viz., (1.) By the failure of the said J. J. Hughes to comply with the requirements of art. 12 (1.) and art. 13 (1.) of the Milk and Dairies Order, 1926, in reference respectively to the provision of sufficient windows and a suitable water supply for cowsheds and dairies in accordance with the notice served on the said J. J. Hughes by the said local authority on the 14th day of January, 1927; and (2.) By the failure of the said J. J. Hughes to comply with the requirements of art. 25 of the said Order with reference to the construction of floors and of the drainage of cowsheds in accordance with the notice served on the said J. J. Hughes by the said local authority on the 3rd day of October, 1928: hereby give you notice to appear before them . . . . on Tuesday the 13th of May, 1930, ... to show cause why the local authority should not for the above reasons remove the name of the said J. J. Hughes from the register of purveyors of milk by retail in respect of the premises. . . . ."

On May 13, 1930, the appellant appeared before the respondents, when, after hearing him, they decided to remove J. J. Hughes from the register.

On May 14, 1930, the respondents forwarded by registered post to the appellant at the farm a notice of that date in these terms: "Whereas J. J. Hughes is registered as a retail purveyor of milk the local authority for the urban district of Mountain Ash hereby give you notice that they have decided to remove the said J. J. Hughes from the register of retail purveyors of milk in respect of the following premises, viz. Gilfach-y-Rhyd Isaf farm . . . ." On the last mentioned date the appellant's solicitors wrote on his behalf to the respondents a letter stating among other things that meanwhile the appellant was continuing to sell milk by retail at the premises.

On May 28, 1930, the appellant gave notice of appeal to the court of summary jurisdiction against the decision of the respondents to remove J. J. Hughes from the register, and obtained a summons to the respondents which was duly served upon their clerk.

On July 3, 1930, the appeal came on for hearing before the magistrate at Mountain Ash police court, the above mentioned facts being admitted by both parties.

When the matter was called on the respondents took the objection that the magistrate had no jurisdiction to hear the appeal on the ground that the appellant was not a "person aggrieved" within the meaning of s. 2, sub-s. 1, of the Act of 1922 by the decision of the respondents to remove J. J. Hughes from the register.

On the part of the appellant it was contended (*a*) that the appellant was a person aggrieved (i.) because he had succeeded J. J. Hughes in the tenancy of the farm and was alone concerned in the selling of milk by retail from the farm; (ii.) because he had received the two notices of May 12 and 14, 1930; (iii.) because whilst J. J. Hughes remained in the register a transfer of names from J. J. Hughes to the appellant could be effected whereas if J. J. Hughes was removed from the register the onus would be upon the appellant to show that the premises sufficiently complied with the provisions of the Acts of 1915 and 1922 and the Order of 1926 before his name could be placed on the register as a retail purveyor of milk in respect of the premises; and (*b*) that as the respondents had served upon the appellant the two notices of May 12 and 14, 1930, and had heard the appellant when he appeared before them on May 13, 1930, they were now estopped from saying that the person was not aggrieved by their decision.

The magistrate held that the appellant was not a person aggrieved by the removal of J. J. Hughes from the register, and that he ought to have waited until the respondents had given their decision on his own application to be registered, which, if adverse, would have given him a right of appeal. He was further of opinion that both parties had committed errors of procedure, and that the matter did not come before him in such a form as would enable him to enter into the merits. He accordingly dismissed the appeal with costs.

The question for the Court was whether on the above statement of facts the magistrate came to a correct determination and decision in law, and, if not, the Court was requested to reverse or amend his determination or to remit the matter to him with the opinion of the Court thereon.

T. R. C. Goff for the appellant. The magistrate was wrong in dismissing the appeal of the appellant against the decision of the respondents, the local authority, to strike Hughes off the register of purveyors of milk by retail in respect of the premises in question. The appellant was entitled to appeal against that decision on the ground that he was a "person aggrieved" by it within the meaning of s. 2, sub-s. 1, of the Milk and Dairies (Amendment) Act, 1922. The appellant was aggrieved by that decision, because he had succeeded Hughes as tenant of the premises to which it related and was the only person engaged in selling milk therefrom. He was aggrieved by the decision, because the respondents had given him the notices of May 12 and 14, 1930, which recognized that he was himself desirous of being registered. The appellant was also aggrieved by the decision, even if it was based only on the ground that Hughes's tenancy had terminated, because it might prevent the appellant as the successor of Hughes in the tenancy of the premises from

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having his name at once substituted for that of Hughes in the register, and make it necessary for him to obtain a fresh registration which he could only obtain by proving afresh that all the conditions imposed by the Acts and Order upon a person seeking to be registered in respect of the premises had been duly fulfilled. It is plain, however, from the contents of the notices that the decision of the respondents was based on the ground that in their opinion the premises were not in a fit condition to be used for the purposes of a dairy, and the appellant was therefore further aggrieved by it, inasmuch as it prevented him as the new tenant of the premises from being registered in respect of them until he either showed that the premises were fit for the purposes of a dairy, or rendered them fit for these purposes. Secondly, the respondents were estopped from contending before the magistrate that the appellant was not aggrieved by their decision, seeing that they had given him these notices and heard him when he appeared to show cause before them.

Carey Evans for the respondents. The magistrate rightly dismissed the appeal on the ground that the appellant was not a " person aggrieved " within the meaning of s. 2, sub-s. 1, of the Act of 1922 by the decision of the respondents. In order that a person may be a " person aggrieved " within the meaning of the sub-section he must be a person who is registered or who seeks to be registered as a retail purveyor of milk, a person as to whom the local authority are satisfied that the public health is likely to be endangered by his act or default, a person upon whom they have served a notice to show cause why they should not refuse to register him or remove him from the register, and a person whom on his failing to show cause they have refused to register or removed from the register. It is clear that the appellant was not a person of any of these descriptions. He was not a person who was registered or who, at the time when the decision of the respondents was given, sought to be registered. He was not a person by whose act or default the public health was alleged to be endangered. He was not a person upon whom the respondents had served a notice to show cause why they should not refuse to register him or remove him from the register; the notice of May 12, 1930, not being a notice to show cause why they should not remove him, but why they should not remove Hughes, from the register. Neither was he a person whom the respondents by their decision refused to register or removed from the register, for he neither sought to be registered nor was registered. The only person whom the respondents by their decision could be said to have either refused to register or removed from the register was Hughes, whom they thereby decided to remove from the register. The appellant could not be a person aggrieved by that decision. As Hughes had ceased to be tenant of the premises, that decision was a proper decision to arrive at and could not aggrieve either him, or the appellant, or any one. So far from aggrieving the appellant that decision was to his advantage, as it left him free to obtain registration for himself in respect of the premises at any time on making application for it to the respondents. The notices of May 12 and 14, 1930, which the respondents sent to the appellant could not cause him to be aggrieved by the decision which followed upon them, because they were quite unnecessary, and were only sent to him in order that he as the new tenant of the premises might know what was being done, and might himself make an application to be registered. They could not even have aggrieved Hughes if they had been directed to and served upon him, as his tenancy had then terminated and it was only right that he should be removed from the register. The statements in the notice of May 12 to the effect that the premises were not in a fit state to be used as a dairy did not render the appellant aggrieved by the decision to remove Hughes. The register is a register of persons using premises. The respondents decided to remove Hughes from the register not because the premises were not fit for use as a dairy, but because he had ceased to be tenant of the premises. They could not have decided to remove him on the ground of the unfitness of the premises, since before the date of the notice alleging the unfitness he had ceased to be the tenant responsible for the premises. Even if the register is a register of the premises, the notices do not prejudice the appellant as the new tenant of these premises, because they do not mention the removal of the premises from the register, but only of Hughes in respect of the premises. Even if the appellant was aggrieved by the decision of the respondents to remove Hughes from the register, the magistrate had no jurisdiction to deal with the case on the merits by inquiring into the grounds of that decision and considering whether the appellant should be registered. It appears from the second and third paragraphs of the sub-section in question that on the hearing of an appeal from the local authority all that the court of summary jurisdiction can do is to require the local authority to register the person aggrieved or not to remove him from the register, or to dismiss the appeal.

AVORY J. In this case the question is whether the appellant, Mr. David Prosser, is a "person aggrieved" within the meaning of s. 2, sub-s. 1, of the Milk and Dairies (Amendment) Act, 1922, by a decision of the respondents, the local authority for the urban district of Mountain Ash. The learned magistrate has held, allowing an objection taken by the respondents, that the appellant is not a person aggrieved within the meaning of the sub-section, and he has accordingly refused to adjudicate upon the appeal which was before him against that decision.

The sub-section provides as follows: [His Lordship read the sub-section (1), and continued :] I assent to the argument of counsel for the respondents to this extent, that that sub-section prima facie contemplates that a person aggrieved by the decision of the local authority is a person whose name has been removed from the register of purveyors of milk by that decision. I think, however, that it also clearly contemplates that a person seeking to be registered may also be a person aggrieved by their decision. It states that if a person who is registered or who seeks to be registered fails to show cause according to the notice served upon him by the local authority thereunder, then the local authority may refuse to register him or remove him from the register, as the case may be. In my opinion, the magistrate has fallen into the error of overlooking the fact that the registration provided for is a registration not only of the person who is going to carry on the business, but also of the premises on which the business is to be carried on. This appears very clearly from art. 6 of the Milk and Dairies Order, 1926, which provides by para. (1.) that "Every sanitary authority shall keep registers of all persons carrying on in their district the trade of cowkeeper or dairyman and of all farms and other premises within their district which are used as dairies," and by para. (3.) that "Subject as aforesaid, no person shall carry on the trade of cowkeeper or dairyman or use any premises as a dairy unless he and any such premises are registered in pursuance of this article."

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(1) See note (1) ante, p. 133.

In the present case the respondents on May 1, 1930, a day when the name of Mr. John Jones Hughes was still on the register in respect of the premises Gilfach-y-Rhyd Isaf farm, sent him a notice by registered post which in the ordinary course would not reach him till May 2, 1930—if it reached him at all, for it is stated in the Case that he vacated the premises on May 1, 1930—that notice calling upon him to show cause why for certain reasons they should not remove him from the register. On May 12, 1930, the respondents having become aware that the appellant had come into occupation of the premises, and, I have no doubt, having also become aware that he proposed to carry on there the same business which Hughes had carried on, if indeed he was not already carrying it on, gave to the appellant by registered post a notice addressed to him at the premises in the following terms: [His Lordship read the notice], thus showing that they intended, unless the appellant showed cause to the contrary, to remove the name of Hughes from the register on account of the premises not being fit for the purpose of being used as a dairy, and not merely on account of his transfer of them to the appellant. In pursuance of the latter notice the appellant appeared before the respondents, and after hearing him they decided to remove Hughes from the register. It cannot be suggested that they so decided merely on the ground that Hughes had ceased to occupy the premises. The fair inference is that they did so not only on that ground, but also because the premises were not made fit for the purpose of being used as a dairy in accordance with certain notices which had been sent to Hughes in 1927 and 1928. On May 14, 1930, the respondents sent by registered post a notice to the appellant that they had decided to remove Hughes from the register in respect of the premises.

In these circumstances, in my opinion, the appellant did become a "person aggrieved" within the meaning of s. 2, sub-s. 1, of the Act of 1922. He was a person who, it is obvious, was seeking to be registered as a retail purveyor of milk in respect of the premises in question. That he was such a person was recognized by the notices which were sent to him by the respondents themselves. Being in that position he was aggrieved by the decision of the respondents that the premises as they then stood were not fit for the purpose of being used as a dairy. The magistrate should therefore, I think, have heard the case on the merits and decided the question whether the respondents were right in holding that these premises were not in a fit condition to be used as a dairy.

Another point taken on behalf of the respondents under s. 2, sub-s. 1, of the Act of 1922 was that the provision that a person aggrieved by the decision of the local authority may appeal to a court of summary jurisdiction, and that court "may require the local authority to register such person or not to remove him from the register," meant that the court of summary jurisdiction instead of dealing with the case itself should refer it back to the local authority to be dealt with by them. As to that point it is sufficient to say that that provision is purely permissive and not compulsory, and that it did not create any difficulty in the way of the magistrate dealing with the case himself.

In my opinion the appeal should be allowed and the case remitted to the magistrate to be heard on the merits.

SWIFT J. I agree. It was contended before the magistrate that the appellant was not a "person aggrieved" within the meaning of s. 2, sub-s. 1, of the Milk and Dairies (Amendment) Act, 1922, by the removal of the name of John Jones Hughes from the register of purveyors of milk by retail in respect of the premises. In my opinion, if the respondents had removed the name of Hughes from the register for no reason except because he had ceased to carry on business at the premises, there would have been a good deal to be said for the respondents' contention that the appellant was not aggrieved by their decision. It is clear, however, when the facts are examined, that the respondents removed the name of Hughes from the register not merely because he had ceased to carry on business at the premises, but also because in their opinion the premises on which he carried on the business were not suitable for the purposes of the business. The appellant, having succeeded Hughes as annual tenant of the premises, was intimately concerned with them, and, indeed, as appears by the Case, he was the only person interested in them at the time when the respondents decided to remove Hughes from the register. That being so, he was a person aggrieved by anything done by the respondents which tended to prevent the business from being carried on there. The attention of the magistrate was not directed to that aspect of the matter. The magistrate was in the circumstances entitled, and, indeed, bound in law to hold that the appellant was a person aggrieved by the decision of the respondents removing Hughes from the register on the ground that the premises were not fit for the purposes of the business.

CHARLES J. I agree.

Appeal allowed. Case remitted.

Solicitors for the appellant: *E. A. S. Howell, for Simons, Smyth & Daniel, Merthyr Tydfil.*

Solicitors for the respondents: *Bell, Brodrick & Co., for Arthur Pincombe, Mountain Ash.*

J. R.

MERRIFIELD (INSPECTOR OF TAXES) *v.* WALLPAPER MANUFACTURERS, LIMITED.

1931
March 3.

Revenue—Income Tax—5 per cent. National War Bonds, 1928, *and 5 per cent. War Loan Stock—Whether separate Sources of Income—Conversion of National War Bonds into 5 per cent. War Loan—Subsequent Acquisition of more War Loan Stock—Computation of Tax—Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case III., rr.* 1, 2.

The Income Tax Act, 1918, Sch. D, Case III., provides that tax shall be charged in respect of the income described in the rules applicable to that case, and the rules provide (inter alia): (r. 1) that the tax shall extend to "(*f*) interest on any Exchequer bonds issued under the authority of the Treasury during the continuance of the present war and a period of six months thereafter, and on any securities issued under the War Loan Acts, 1914 to 1917, or any Act amending those Acts, in cases where such interest is paid without deduction of tax"; and (r. 2) the tax shall be computed in each case on the full amount of the profits or income arising within the year preceding the year of assessment:—

Held, that the words "interest . . . . on any securities issued under the War Loan Acts, 1914 to 1917," designated one taxable subject matter and not several sources of income.

A taxpayer was the holder of a number of 5 per cent. National War Bonds, 1928 (Third Series). These bonds were on December 1, 1924, converted into 5 per cent. War Loan Stock, 1929–47. The taxpayer in the following year purchased additional 5 per cent. War Loan Stock, 1929–47. Both the 5 per cent. National War Bonds, 1928, and the 5 per cent. War Loan Stock, 1929–47, were securities issued under the War Loan Acts. A question arose whether they were of the same class or source for the purposes of rules 1 and 2 applicable to Case III. of Sch. D of the Income Tax Act. The taxpayer contended that they were the same source, and that therefore the assessment for the year in question should be computed on the basis of the income arising within the year preceding the year of assessment. The Crown, on the other hand, contended that the income arising from 5 per cent. National War Bonds and 5 per cent. War Loan Stock was income arising from different sources, and that therefore the assessment for the year in question ought to be computed on the income of the year of assessment:—

Held, that as both the 5 per cent. National War Bonds, 1928, and the 5 per cent. War Loan Stock, 1929-47, were securities issued under the War Loan Acts, 1914 to 1917, the interest arising from those securities arose from the same source and ought not to be split up for the purpose of charging income tax.

CASE stated under s. 149 of the Income Tax Act, 1918, by the Commissioners for the General Purposes of the Income Tax for the Division of St. Giles in the Fields and St. George's, Bloomsbury, in the county of Middlesex, for the opinion of the King's Bench Division of the High Court of Justice.

At a meeting of the Commissioners held at 40 Russell Square, London, W.C. 1, on June 12, 1929, the Wallpaper Manufacturers, Ld. (hereinafter called "the respondents"), appealed against an estimated assessment to income tax in the sum of 26,000*l.* for the year ended April 5, 1927, made upon them under Sch. D of the Income Tax Act, 1918, in respect of untaxed interest arising from 5 per cent. War Loan Stock, 1929–47, in the following circumstances.

1. Prior to December 1, 1924, the respondents were the holders of 275,000*l.* 5 per cent. National War Bonds, 1928 (Third Series). On that date under the terms of Treasury Regulations the said War Bonds were converted into 5 per cent. War Loan Stock, 1929–47, amounting to 289,473*l.* 13*s.* 8*d.* The respondents subsequently purchased additional 5 per cent. War Loan Stock, 1929–47, as follows:—

Date of purchase.	Amount purchased.
March 14, 1925	100,000*l.*
June 25, 1925	50,000*l.*
July 10, 1925	40,900*l.*

Both the said War Bonds and the said War Stock were securities issued under the War Loan Acts. The first payment of interest on the 5 per cent. War Loan Stock was made to the respondents on June 1, 1925.

2. The question in dispute between the parties was whether the securities above referred to (i.e., National War Bonds and War Loan Stock) were of the same class, or source, for the purposes of rr. 1 and 2 applicable to Case III. of Sch. D of the Income Tax Act, 1918. If they were it was agreed between the parties that the assessment for the year in question should be computed on the basis of the income arising within the year preceding the year of assessment; but if they were not, that the computation should be made on the income of the year of assessment.

3. On behalf of the respondents it was contended that the assessment should be made in the amount of the profits or income arising within the year preceding the year of

assessment as provided by r. 2 (1.) (*b*), of the Rules applicable to Case III. of Sch. D.

4. It was contended on behalf of the Inspector of Taxes: (1.) That the income arising from 5 per cent. National War Bonds and 5 per cent. War Loan Stock was income from separate sources for the purposes of Case III. of Sch. D of the Income Tax Act, 1918. (2.) That the income in question first arose on June 1, 1925. (3.) That accordingly the assessment under appeal was rightly computed on the income of the year of assessment as provided by proviso (i.) of r. 2 (1.) (*b*) of the Rules applicable to Case III. of Sch. D.

[The following cases were cited: *Brown* v. *National Provident Institution* (1); *Whelan* v. *Henning* (2); *Grainger* v. *Maxwell's Executors* (3); *Walker* v. *Howard* (4); *Turton* v. *Mitchell.* (5)]

5. The Commissioners held that the income from National War Bonds, 1928, and 5 per cent. War Loan Stock, 1929-47, were from the same source for the purposes of Case III. of Sch. D of the Income Tax Act, 1918.

Immediately upon the Commissioners so determining the appeal the Inspector of Taxes expressed his dissatisfaction with the decision as being erroneous in point of law, and in due course required the Commissioners to state a case for the opinion of the High Court, which case the Commissioners stated and signed accordingly.

6. No question of figures arose on the appeal, it being agreed between the parties that if the decision of the Commissioners was correct the assessment under appeal should be reduced to 21,746*l.*, being the income arising in the year preceding the year of assessment, and that if the decision of the Commissioners was wrong the assessment should be reduced to 24,018*l.*, being the income arising in the year of assessment.

Agreed statement of facts supplemental to the case:—

1. The 5 per cent. National War Bonds, 1928 (Third Series),

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(1) [1921] 2 A. C. 222; 8 Tax Cas. 57.

(2) [1926] A. C. 293; 10 Tax Cas. 263.

(3) [1926] 1 K. B. 430; 10 Tax Cas. 139.

(4) (1927) 138 L. T. 367; 13 Tax Cas. 313.

(5) (1927) 138 L. T. 365; 13 Tax Cas. 245.

of which the respondents were the holders as set out in para. 1 of the case, were issued by the Governor and Company of the Bank of England under the authority of the Lords Commissioners of His Majesty's Treasury upon the terms and conditions set out in a supplement to the London Gazette, dated October 1, 1918.

2. The terms and conditions upon which the said 5 per cent. National War Bonds, 1928 (Third Series), were converted by the respondents into 5 per cent. War Loan Stock, 1929-47, as stated in para. 1 of the case, are set out on p. 11634 of the said supplement referred to in para. 1 hereof.

3. The 5 per cent. War Loan Stock, 1929-47, of which the respondents were the holders as set out in para. 1 of the case, was issued by the Governor and Company of the Bank of England upon the terms and conditions set out on p. 493 et seq. of the London Gazette dated January 12, 1917.

Sir William Jowitt A.-G. and *R. P. Hills* for the Crown.

Needham K.C. and *J. S. Scrymgeour* for the respondents.

ROWLATT J. The question in this case may be stated thus: Do the words, "securities issued under the War Loan Acts," in the rule applicable to Case III., r. 1 (*f*), of Sch. D of the Income Tax Act, 1918, designate one taxable subject-matter, or are they a generic expression comprising a number of subjects of taxation which do not lose their separate identity by being described by one comprehensive description?

Now it seems to me that in approaching that question one ought to approach it in this way. The Income Tax Acts are a tax upon the yearly profits and gains of the subject, and among the yearly profits and gains, upon interest of money, and the whole field of yearly profits and gains is split up and sub-divided for the purposes of different methods of charging, assessment and so on, but in my opinion, the tax being in the first instance upon profits and gains, one ought not to disintegrate the groupings of the profits and gains according to sources further than the Income Tax

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Rowlatt J.

Act affirmatively requires. I think the idea that underlies the decision of the House of Lords in *Diggines* v. *Forestal Land, Timber & Rys. Co., Ld.* (1) is that when you find several things grouped under one head, you are not to sub-divide them unless there is some reason for it. It is just on those lines, I think, that they criticised and differed from the dicta that had been expressed in the Court of Session in *Inland Revenue Commissioners* v. *Drysdale's Trustees.* (2)

From that point of view I come to this rule under Case III. I think it is now clear that the whole rule is not to be treated as dealing with one subject-matter. The Court of Appeal have certainly affirmed me in that, and they have also affirmed me in saying that the separate letters in r. 1 are not to be taken as separate divisions. The letters must be disregarded, and the rule runs on as stating a series of named sources. Under (*f*) we come to "Interest on any Exchequer Bonds," which is included in a string of things which are not all to be lumped together. The Court of Appeal in *Grainger* v. *Maxwell's Executor's* (3) agreed with what I had said (4), that as it was separately mentioned it must be treated as a separate head of income.

Then one comes on to "securities issued under the War Loan Acts," and I do not find any authority for splitting that head up. I go back to what I started with. The Income Tax Acts are taxing interest, and are dealing with interest from various sources, and the Act says: "Interest . . . . on any securities issued under the War Loan Acts." The subject-matter of the taxation is interest from securities issued under a certain number of Acts, and I do not see any justification or authority for saying that that means that the income received from the several investments which can comprehensively be described as being covered by this group of Acts of Parliament can be said to be derived from several sources of income. I think *Diggines* v. *Forestal*

(1) [1931] W. N. 16; [1931] A. C. 380.

(2) (1928) 13 Tax Cas. 565.

(3) [1926] 1 K. B. 430; 10 Tax Cas. 139.

(4) [1925] 2 K. B. 376.

Land, Timber & Rys. Co. (1) gives great guidance in this matter, and on the grounds that I have expressed I have come to the conclusion that this appeal ought to be dismissed.

Appeal dismissed.

Solicitor for Crown: *Solicitor of Inland Revenue.*
Solicitors for respondents: *Johnson, Jecks & Colclough.*

R. F. S.

1931
March 6.

SLANEY (INSPECTOR OF TAXES) *v.* THE REVEREND E. S. STARKEY.

Revenue—Income Tax—Office or Employment of Profit—Assistant Stipendiary Curate—Profits arising from Office—Voluntary Collection in Church at Whitsuntide—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. E, r.* 1.

A voluntary collection was taken in church at Whitsuntide for the benefit of the assistant stipendiary curate licensed by the Bishop to that church. Contributions were solicited by the Vicar in the Parish Magazine on the ground of the curate's "devoted and earnest ministry amongst us":—

Held, that the assistant stipendiary curate was the holder of an office or employment of profit within the meaning of Sch. E of the Income Tax Act, 1918, and that the Whitsuntide offerings were chargeable to income tax as emoluments of his office under Sch. E, r. 1, of the Income Tax Act, 1918.

CASE stated under the Income Tax Act, 1918, s. 149, by the Commissioners for the General Purposes of the Income Tax Act for the Division of Edmonton, in the county of Middlesex, for the opinion of the High Court of Justice.

At a meeting of the Commissioners held at Enfield on March 4, 1930, for the purpose of hearing appeals, the Rev. E. S. Starkey (hereinafter called "the respondent")

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(1) [1931] W. N. 16; [1931] A. C. 380.

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appealed against assessments to income tax under Sch. E of the Income Tax Act, 1918, as follows :—

Additional first assessment,	1927–28 .	£20 10 0
,, ,, ,,	1928–29 .	£20 10 0
First assessment, 1929–30 .	. .	£263 10 0

The first two assessments were made on the respondent as assistant stipendiary curate in respect of voluntary collections taken at Whitsuntide and received by him. The third assessment was in respect of the respondent's stipend of 240*l.*, plus a sum of 23*l.* 10*s.*, for a voluntary collection taken at Whitsuntide and received by him.

The figures for the collections taken at Whitsuntide were estimates only, as the actual figures were refused by the respondent.

The sole question before the Commissioners at the hearing of the appeal was whether or not the offerings received at Whitsuntide by the respondent were liable to income tax in his hands.

In his income tax returns for the material years the respondent described himself as a " curate," and was assessed to income tax under Sch. E accordingly.

The respondent was appointed " to perform the office of assistant stipendiary curate " in the Parish Church of St. Gabriel, Bounds Green, Middlesex, under licence from the Bishop of London dated February 22, 1926. A copy of the licence was annexed to and formed part of the case.

The fact that the voluntary collections taken at Whitsuntide would be for the benefit of the respondent was referred to each year in the Parish Magazine. The reference in 1929 was in the following terms : " Whitsuntide, May 19th. The collection throughout the day will be given to the Assistant Priest, and I feel sure there are many who will welcome this opportunity of expressing their goodwill and gratitude to the Rev. E. S. Starkey for his devoted and earnest ministry amongst us."

Mr. Marshall Freeman for the respondent contended that the offerings, being small sums of money given to the

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respondent by friends and members of the Church at which he had been performing his clerical duties, were not analogous to Easter offerings, and stated that the respondent was not a curate in the strict ecclesiastical sense of the term, nor did he occupy any office in the parish within the meaning of the Income Tax Act, 1918, but was licensed by the Bishop of London to perform the office of assistant stipendiary curate, and was not the servant either of the Parochial Council or of the Vicar, but remained directly responsible to the Bishop of London for the due performance of the ecclesiastical duties of a clergyman of the Church of England licensed to the said office.

Counsel also stated that an Easter offering is one which is by law due to the Vicar of the parish, and referred to the eighth Rubric after the Communion Service in the Book of Common Prayer, and also referred, to distinguish the position, to the service for the Ordination of Deacons, where they are ordained to an "office," and to the service for the Ordination of Priests, who are appointed for "office and work."

[He cited the cases of *Inland Revenue* v. *Strang* (1); *Turner* v. *Cuxon* (2); *Herbert* v. *McQuade* (3); and *Turton* v. *Cooper*. (4)]

The Inspector of Taxes contended that the respondent was the holder of an office or employment of profit within the meaning of Sch. E of the Income Tax Act, 1918, and that the said Whitsuntide offerings were chargeable to tax under r. 1 of the Rules applicable to that Schedule.

[He referred to the case of *Blakiston* v. *Cooper*. (5)]

The Commissioners allowed the appeal, whereupon the inspector expressed dissatisfaction with the decision of the Commissioners, as being erroneous in point of law, and subsequently requested that a Case might be stated for the opinion of the High Court pursuant to the Income Tax

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(1) (1878) 15 Sc. L. R. 704; 1 Tax Cas. 207.

(2) (1888) 22 Q. B. D. 150; 2 Tax Cas. 422.

(3) [1902] 2 K. B. 631; 4 Tax Cas. 489.

(4) (1905) 21 T. L. R. 546; 5 Tax Cas. 138.

(5) [1909] A. C. 104; 5 Tax Cas. 347.

Act, 1918, which Case the Commissioners stated and signed accordingly.

The question for the decision of the Court was whether the respondent was liable to pay income tax upon the amount received by him as voluntary offerings at Whitsuntide.

COPY LICENCE REFERRED TO IN CASE.

" Arthur Foley, by Divine Commission, Bishop of London to our beloved in Christ Ernest Walter Josiah Stanley Starkey, Clerk, B.D. Greeting. We do by these presents give and grant unto you our licence and authority to perform the office of assistant stipendiary curate in the Parish Church of St. Gabriel, Bound's Green in the county of Middlesex within our diocese and jurisdiction, in preaching the Word of God, and in reading the Common Prayers and performing all other ecclesiastical duties belonging to the said office, according to the form prescribed in the Book of Common Prayer, made and published by authority of Parliament, and the Canons and Constitutions in that behalf lawfully established and promulgated, and not otherwise, or in any other manner. And we do by these presents assign unto you the yearly stipend of 240*l.* to be paid quarterly for serving the said cure. And we do direct that you reside within the distance of one mile of the said Parish Church."

" In witness whereof we have caused our seal which we use in this case to be hereto affixed. Dated " February 22, 1926, " and in the twenty-fifth year of our translation."

Sir William Jowitt A.-G. and *R. P. Hills* for the Crown.

Marshall Freeman for the respondent.

ROWLATT J. In my judgment it is quite clear that in this case the Crown are entitled to succeed, although it is very unpleasant to have to decide against the respondent, but one has to apply the law to the best of one's ability. I have heard a very interesting argument from Mr. Freeman as to the position of Mr. Starkey, who is described in the Bishop's licence as "assistant stipendiary curate in the Parish Church"; but, to be accurate, no doubt he is what is called an unbeneficed clergyman. I have heard a great deal as to the position of clergymen who are thus employed, how they are in law dependent upon the Bishop, and so on, but I do not think that those considerations really help very much in determining this question, which is whether he holds an office or employment of profit within the meaning of the Income Tax Acts.

It is said that he has no employer. With regard to that I should have thought that in practice and in reality his employer is the Vicar of the parish, by arrangement with whom he comes there, and under whom he really works. It is true that he is not in the position of having an ordinary contractual employment, and it has been held (1) that a clergyman in that position is therefore not insurable under the National Insurance Act, 1911. He does not hold that position, but if it is necessary that he should have an employer, I should think it is quite sufficient to say that the Vicar, who asked him to come there, and who pays him the stipend agreed, and under whom he works, is his employer for this purpose. But I do not know that it is really necessary that he should have an employer, because if he employs himself in doing work, or is employed by an undefined authority residing somewhere in the Church, to do some work, for which he in fact is remunerated, I should have thought that that would be quite enough to answer the word "employment," even though he could not put his finger upon a particular person as being his employer.

But apart from that I am inclined to think that he holds an "office." (1) It is said in Cripps on the Law relating to the Church and Clergy, 7th ed., p. 158, that "the position of a stipendiary curate, whether formally licensed by the Bishop, or a probationer under the Bishop's temporary permission, is that of a person who holds an ecclesiastical office, and who owes a duty to his ecclesiastical superiors." It may be that inasmuch as there is no permanent office which successive people occupy, but only a curacy of this kind, and it arises each time, that it is not an office. It may be true that where the word is used in the licence of the Bishop "office" means "cure" in the sense of duty, and "to perform the office" is the phrase used both where it says: "authority to perform the office of assistant stipendiary curate," and "performing all other ecclesiastical duties belonging to the said office." It may be that may merely refer to the duty, and not involve the legal conception which strictly speaking is described by the use of the word "office." All I can say is that the proposition that he has an "office or employment" within the meaning of the Income Tax Acts seems to me to be one which cannot possibly be questioned.

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(1) It was held by Parker J. in *In re National Insurance Act*, 1911. *In re Employment of Church of England Curates* [1912] 2 Ch. 563, that the position of a curate in the Church of England is that of a person who holds an ecclesiastical office, and not the position of a person whose duties and rights are defined by contract. Therefore the relation between the incumbent and the curate, or the bishop and the curate, is not the relation of employer and employed, and the curate is not compulsorily insurable under the National Insurance Act, 1911.

But even if that proposition be questioned, has he not really a profession? There is no escape for him from the purview of the Income Tax Acts. Does he not have a profession, although a profession which, if you like, collects its remuneration without a legal obligation? It is difficult to refer to analogies in a case of this sort without referring to analogies which might be thought to be flippant, or to give offence, but one can think of occupations, trades or professions which undoubtedly attract emoluments, although every individual contributor contributes voluntarily. So much for that part of the case.

Now I come to the question whether these Whitsuntide offerings are an emolument of his office. With regard to that, it is true that there is no such thing as a Whitsuntide offering known in ecclesiastical law, whereas in theory at any rate, and I suppose in strict law, the Vicar has the right to the Easter offerings. That may be so, but there is no such thing as a right in the curate; there is no doubt about that. But then it comes back to this question. This curate being in that position and exercising this office or employment, do these sums come to him, it may be voluntarily given, as remuneration for his services in that office, or do they come to him as a personal gift?

Now some stress was laid by the Attorney-General upon the point of periodicity. He pointed out that these offerings had been given to Mr. Starkey for three successive Whitsuntides. On the other hand Mr. Freeman said: "That does not make any difference at all, because the question would be the same if it arose upon the first Whitsuntide." I rather agree with Mr. Freeman in that respect, but I do not think that that gets rid of the argument as to periodicity. When Lord Phillimore in *Seymour* v. *Reed* (1) spoke of the element of periodicity he was speaking of a case in which, as it was held, there had been a benefit to a cricket professional given once for all; it was given without any reference to recurrent seasons. When one speaks of an element of periodicity I think what is intended is to refer to a thing which has reference to the recurrence of periods, even though the periods may only come round once, or may only have come round once so far. It is analogous to the question which arises with regard to annual profits and gains. There may only be one time when the profits and gains arise, but still it may be "annual"; that has been held in several cases. It is only because it has reference to the year, and is not a lump sum without reference to recurring periods, as in the cricketer's case it was held to be. In that sense I think there is an element of periodicity here, not because the collection has happened three times, but because it is made on the occasion of a festival in the church which occurs only once in the year. There cannot possibly be two Whitsuntides in any year, and there must be one Whitsuntide in every year. Therefore I think that there is an element of periodicity, if that is an essential point.

Now another point is this: Mr. Freeman said, and said quite truly as a matter of fact, and we all know it and feel it, that if a curate is known to be a rich man with a large patrimony of his own, the parishioners will not contribute—except perhaps as a matter of compliment to him—to the same extent to offerings of this kind. That is true, but I think I am bound by authority to say that that is not a conclusive matter at all, as Cozens-Hardy L.J. said quite clearly in his judgment in *Poynting* v. *Faulkner*. (1) This is what he says: "Holding as I do that this is primarily not a personal gift but an augmentation of the stipend of the minister, it is none the less so because the trustees, in considering how they should distribute an inadequate fund, have regard to the pecuniary position of the ministers." I think it is quite possible that people might say: "The curate is insufficiently paid for the work that he does, and I would make a handsome contribution if it were not for the fact that he happens to be a rich man on his own account and does not need it." That is all it comes to, and I do not think that that consideration very much affects the matter.

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(1) [1927] A. C. 554, 570; 11 Tax Cas. 625, 654.

I come back again therefore to what is the question on the materials before me in this case. I have no finding of fact by the Commissioners. It has always seemed to me that this was very largely a question of degree, and therefore of fact, and so Lord Carson seems to have treated it in *Seymour* v. *Reed*. (2) But one cannot read the judgment of Collins M.R. in *Herbert* v. *McQuade* (3) and then dispose of this case on that footing, or send it back to the Commissioners to have a finding of fact, in terms, upon the question whether it was a gift or whether it was remuneration. I think I have to decide it, and I must decide it upon the materials which come before me, and the materials before me when one looks at them consist of nothing except the licence of the Bishop and the statement in the Parish Magazine, which is as follows: "The collection throughout the day will be given to the Assistant Priest, and I feel sure there are many who will welcome this opportunity of expressing their goodwill and gratitude to the Rev. E. S. Starkey for his devoted and earnest ministry amongst us." Really that is all that I have got to go upon and it seems to me to conclude the case.

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(1) (1905) 5 Tax Cas. 145, 158.

(2) [1927] A. C. 554, 572; 11 Tax Cas. 625, 656.

(3) [1902] 2 K. B. 631, 641; 4 Tax Cas. 489, 492.

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SLANEY v. THE REVEREND E. S. STARKEY.

Rowlatt J.

I may point out that in the very short and conclusive sentence expressed by Lord Loreburn L.C. in *Blakiston* v. *Cooper* (1) at the end of his judgment, he says: "The real character of what was done appears clearly enough from the papers in which contributions were solicited." Now here the contribution was solicited in a paper which says, to put it shortly, that the contributions are solicited for Mr. Starkey's "devoted and earnest ministry amongst us."

In these circumstances, although I very much dislike deciding these cases against people like Mr. Starkey, I have no alternative but to say that I think the Crown are right and that this appeal must be allowed.

Appeal allowed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for respondent: *Bentleys.*

(1) [1909] A. C. 104, 107; 5 Tax Cas. 347, 355.

R. F. S.

HARRODS, LIMITED *v.* LEMON.

[1929. H. 3538.]

K. B. D.
1930
Nov. 19, 20;
Dec. 1.
C. A.
1931
Feb. 2, 3.

Principal and Agent—Agent carrying on Two separate Departments of Business—Estate Department—Building Department—Estate Department as Agent for Vendor sells House on Commission—Building Department advises Purchaser on Condition of Drains—Discovery by Agent of his dual Action—Offer by Agent to invite Purchaser to obtain independent Survey of Drains—Offer not accepted—Sale concluded at reduced Price—Reduction due to Report on Drains—Right of Agent to Commission.

The plaintiffs, a trading company, carried on an estate agency and a building business in separate buildings. The defendant employed the plaintiffs, through their estate agency, to find a purchaser for real property, and they found C., who agreed to purchase the property subject to contract and a surveyor's report. C. employed the plaintiffs, through their building department, to inspect the drains of the property and to make an estimate for putting them in order. As a result of the report C. claimed a reduction in the purchase price. Subsequently after complaint by the defendant, the plaintiffs discovered that they had been acting in this way for both the potential vendor and purchaser, and, by their solicitors, offered the defendant to invite the purchaser to obtain an independent survey of the drains. The defendant did not accept the offer, but completed the sale at a reduction of the agreed price, the reduction being due to the work required to be done upon the drains. The plaintiffs sued the defendant for commission on the sale:—

Held, by Avory J., that the plaintiffs had acted in good faith, and that the defendant had in fact suffered no damage, as C. would in any event have secured a report on the drains, and any competent person would have recommended an expenditure on the drains of more than the reduction in the purchase price.

Held, also, that the plaintiffs constituted one person in law, however many businesses they might carry on, and that in acting as they did they committed a breach of their duty as agents of their principal, but that as the defendant with full knowledge of the breach of duty on the part of the plaintiffs had completed the contract at the reduced price, the plaintiffs were entitled to commission.

On appeal by the defendant:—

Held by the Court of Appeal (affirming the decision of Avory J.), that the plaintiffs were entitled to their commission from the vendor, as she, with full knowledge of their action on behalf of the purchaser, had refused the offer of the plaintiffs to stand aside that C. might have the drains tested by another firm, and had concluded the sale at the reduced price.

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HARRODS, LD. v. LEMON.

ACTION in the special jury list, tried without a jury by consent.

The plaintiffs' claim was for 25*l.*, the cost of advertisements, and 167*l.* 10*s.* commission on the sale of a property at 7337*l.* 10*s.* The 25*l.* was paid into Court. As to the claim for commission, the defendant before action tendered to the plaintiffs the sum of 5*l.* 10*s.* in satisfaction, and by her defence alleged that the plaintiffs had been guilty of a breach of duty as agents to the defendant, and that by reason thereof the plaintiffs were not entitled to any commission. The defendant paid 5*l.* 10*s.* into Court. Alternatively she counterclaimed the sum of 162*l.* 10*s.* as damages for the breach of duty.

The plaintiffs were employed by the defendant Mrs. Kent Lemon as estate agents to find a purchaser for a property known as "Blythswood" at Ascot, and on or about July 3, 1929, they in such capacity, and with the defendant's authority, arranged for the sale of this property to a purchaser Mrs. Hugh Campbell, for 7500*l.*, subject to contract and a surveyor's report. On July 8, 1929, the purchaser, who had had previous business dealings with the building department of the plaintiffs, which was situate in a separate building from that of the estate department, called upon the manager of the building department, told him that she had bought a house at Ascot, and asked him to inspect it with her with a view to alterations and improvements. On July 9, 1929, at the inspection the manager suggested that the drains should be inspected. Mrs. Campbell, the purchaser, agreed, and requested him to give an estimate for putting them in order, if necessary. On July 12, 1929, the manager of the plaintiffs' building department sent a telegram and a letter to Mrs. Campbell reporting that the drains were in a bad condition and would have to be renewed at an approximate cost of 400*l.* At the time when the telegram and letter were sent the fact that the sale of the property had been negotiated by the estate department was not known in the building department, and the fact that the building department was reporting on the condition of the drains, or at all, was not known in the estate department. On July 16, 1929, the solicitor for Mrs. Campbell wrote to the solicitors for the defendant that if Mrs. Campbell incurred the expense of putting the drains in order there would have to be a deduction from the purchase price. On July 17, 1929, the solicitors for the defendant complained that they had discovered that the plaintiffs were acting for the purchaser, to which the manager of the estate department replied that the fact of the building department having given an estimate for work to be done on the premises did not affect their position as agents for the sale of the property. On the same day the manager of the building department was informed of the complaint after he had sent in an estimate to Mrs. Campbell for the repair of the drains.

On July 23, 1929, Messrs. McKenna, solicitors to the plaintiffs, in a letter to the defendants' solicitors wrote: "Our clients are quite satisfied that if any other contractor had been asked to give an estimate for putting the property in order the result would have been the same. In these circumstances we do not know what complaint your client has unless she suggests that our clients' building construction department has made a wrong report. If you feel that this is so, we will advise our clients to ask the purchaser to have the drains tested by another firm. As we have stated, the purchase was subject to survey, and consequently whether our clients' building construction department pointed out the deficiencies in the drains or some other person did so, the fact remains that the vendor would have been left in the same position as she now is so far as the purchaser is concerned." The defendant did not accept this offer that the plaintiffs should ask the purchaser to obtain an independent survey. The building department continued to act for Mrs. Campbell, the purchaser, and on July 31 the contract for the sale of the property was completed at the reduced price of 7337*l*. 10*s*., the reduction of 162*l*. 10*s*. having been made on account of the work that had to be done to the drains, with the knowledge of the defendant that the plaintiff's building department had been acting, as has been stated.

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HARRODS, LD. v. LEMON.

du Parcq K.C. and *Henn Collins* for the plaintiffs. There was here no breach of duty by the plaintiffs to the defendants, and the advice to the potential purchaser was not inconsistent with the plaintiffs' duty, as house agents to the vendor, to procure the best possible bargain for their principal. There was no conflict of interests here from the point of view of the vendor, and even if there was a conflict of interest it is theoretical rather than practical, and there was no real breach of duty. The plaintiffs therefore are entitled to their commission: *Keppel* v. *Wheeler* (1); *Hippisley* v. *Knee Brothers.* (2) In fact no damage was suffered by the defendant by anything done by the plaintiffs. There is no question that the drains required attention and an expenditure of more than the amount of the reduction in the purchase price, and it is plain that if the purchaser had not employed the building department of Messrs. Harrods to make a survey she would have employed some other competent person. The plaintiffs by their solicitors' letter of July 23, 1929, offered to advise the plaintiffs to ask the purchaser to have the drains tested by another firm. This offer was not accepted, and with full knowledge of the facts the vendor concluded the sale at the reduced price.

Linton Thorp for the defendant. No charge of fraud or dishonesty is made against the plaintiffs, but in their capacity as agents they have been guilty of misconduct that disentitled them to recover this commission. Juridically Harrods, Ld., are one legal entity, and it is immaterial that two branches of the same business, the estate department and the building constructional department, are carried on as separate departments in separate buildings. Harrods, Ld., can only act through agents, and they are responsible for the acts of their agents within the scope of their agency. The knowledge of the estate department and that of the building constructional department is the knowledge of the plaintiffs. There is no exception to the ordinary law of agency in the case of multiple shops.

[AVORY J. I need not trouble you further upon this point.]

(1) [1927] 1 K. B. 577.

(2) [1905] 1 K. B. 1.

The plaintiffs were the agents for the defendant, and their agency persisted until July 31, 1929, when the contract for the sale of the property was signed : *Keppel* v. *Wheeler*. (1) During that time they could not lawfully accept an agency for a person with a conflicting interest such as Mrs. Campbell, the purchaser, without full disclosure to the principal and permission by the principal of such acceptance : *Parker* v. *McKenna* (2) and *Fullwood* v. *Hurley*. (3) The prohibition against an agent acting for both vendor and purchaser is absolute. In *Keppel* v. *Wheeler* (1) Atkin L.J. was dealing only with omissions on the part of agents amounting to a breach of duty and not with active misconduct on the part of an agent, as where an agent acts for both vendor and purchaser. In *Hippisley* v. *Knee Brothers* (4) the agents, claim to out-of-pockets was merely incidental to and separable from their main duty. Lord Alverstone C.J. said in that case (5) : "If the discount had been received from the purchasers the case would have been covered by *Andrews* v. *Ramsay* (6); but here it was received in respect of a purely incidental matter ; it had nothing to do with the duty of selling." The plaintiffs sought to make a profit from the purchaser as well as from the vendor, and this they may not do except where such profit is severable and unconnected with their duty to the vendor : *Nitedals Taendstikfabrik* v. *Bruster* (7) ; see also *Rhodes* v. *Macalister* (8) and *Boston Deep Sea Fishing and Ice Co.* v. *Ansell*. (9) It is immaterial whether the principal sustained damage by the act of the agent : *Andrews* v. *Ramsay* (6) The plaintiffs cannot recover on their claim.

du Parcq K.C. replied.

Cur. adv. vult.

1930. Dec. 1. AVORY J. The plaintiffs were employed by the defendant as estate agents to find a purchaser for a property known as "Blythswood" at Ascot, and on or about

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(1) [1927] 1 K. B. 577.
(2) (1874) L. R. 10 Ch. 96, 118.
(3) [1928] 1 K. B. 498.
(4) [1905] 1 K. B. 1.
(5) [1905] 1 K. B. 8.
(6) [1903] 2 K. B. 635.
(7) [1906] 2 Ch. 671.
(8) (1923) 29 Com. Cas. 19.
(9) (1888) 39 Ch. D. 339.

July 3, 1929, they, in such capacity and with the defendant's authority, arranged for the sale of the property at 7500*l.*, subject to contract and to surveyor's report to a Mrs. Hugh Campbell. In these circumstances they remained subject to the duty and obligation of an agent until the formal contract was completed, to obtain the best price possible for the vendor: *Keppel* v. *Wheeler.* (1) At the same time until the contract was completed it remained open to the purchaser to reduce the offer in view of any adverse report by a surveyor on the condition of the drains or otherwise. [His Lordship then stated the facts of the case and continued :] In these circumstances the question is whether the plaintiffs have been guilty of a breach of their duty as agents of the defendant, the vendor, and if so whether they have thereby forfeited their right to claim their commission. I cannot accept the contention put forward by the plaintiffs and their solicitors that the estate department and the building department are to be regarded as two separate entities. Harrods, Ld., the plaintiffs, are one person in law, however many businesses they may carry on. In acting as they did through their building department for the purchaser they were committing a breach of their duty as agents for the vendor. They were, in the words of Cotton L.J. in *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (2) putting themselves in such a position that they had a temptation not faithfully to perform their duty to their employers. I find as a fact that in so acting they were not guilty of any fraud or dishonesty, as was admitted by counsel for the defendant, but, in the words of Bankes L.J. in *Keppel* v. *Wheeler* (3) they were acting in good faith, but under a misapprehension as to their legal position in reference to their client.

I also find as a fact that no damage has been suffered by the defendant by reason of anything done by the plaintiffs. I am satisfied on the evidence that the purchaser would in any event have had a report on the drains before completing the contract, and that the report by any competent person would have recommended the expenditure of 200*l.* at least on the drains as necessary, apart from improvements, and that the purchaser would not in the circumstances have been willing to complete the contract for any sum greater than the 7337*l.* 10*s.* The defendant, with full knowledge of the alleged breach of duty, and of the fact that a sum of over 200*l.* was estimated to be required to put the drains in order, agreed after negotiations with the purchaser to accept the reduced price of 7337*l.* 10*s.*, and in view of the judgments in the Court of Appeal in *Keppel* v. *Wheeler* (1), in which it was held that the agent was entitled to recover the commission notwithstanding that he was liable to substantial damages for breach of duty, I think that the plaintiffs in the circumstances are entitled to recover commission of 167*l.* 10*s.* on the purchase price of the property. There will be judgment for the plaintiffs for 167*l.* 10*s.* on the claim and on the counterclaim with costs. The sum of 25*l.* in Court for the cost of advertisements will be paid out to the plaintiffs, and the other sum of 5*l.* 10*s.* in Court will be paid out to the plaintiffs in part satisfaction.

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(1) [1927] 1 K. B. 577.
(2) 1888) 39 Ch. D. 339.
(3) [1927] 1 K. B. 577, 583.

T. W. M.

The defendant appealed. The appeal was heard on Feb. 2, 3, 1931.

Linton Thorp for the appellant repeated in substance the arguments used by him in the Court below.

du Parcq K.C. and *Henn Collins* for the respondents were not called upon to argue.

LORD HANWORTH M.R. This appeal fails, and the judgment of Avory J. must be affirmed.

The action is brought by Messrs. Harrods, Ld., the well known company that carry on a large business in the Brompton Road, a business which has many branches and activities. Among other branches it has, in a separate building (though that matters but little), a branch where an estate agency is carried on, and in the main block of buildings there is a branch called the building construction department.

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(1) [1927] 1 K. B. 577.

The action is brought to recover from Mrs. Helen Kent Lemon two sums, the first in respect of certain out-of-pocket expenses incurred by the defendant, who was the owner of a property called "Blythswood," at Ascot, and the second a sum of 167*l.* 10*s.*, being the fee calculated according to the usual scale on which commission is payable to a house agent who introduces a purchaser to the owner of estate property.

With regard to the first item, the out-of-pocket expenses, no question arises; that money was paid into Court, and has been accepted in full satisfaction by the plaintiffs.

The issue in the case arises upon the question whether or not Messrs. Harrods are entitled to receive their scale fee, under the circumstances which I must shortly state. Mrs. Lemon, as I have said, was the owner of "Blythswood" at Ascot, and she was minded to sell it, and she put it into the hands of the estate agency carried on by Messrs. Harrods, the relevant time being the summer of 1929. By about July 3 of that year, in their capacity of estate agents, and with the defendant's authority, they arranged for the purchase of the property by a Mrs. Campbell, at a sum of 7500*l.*, but a term of that bargain was that it was "subject to contract and a surveyor's report." Pausing there, at that time, therefore, Messrs. Harrods, as estate agents, had succeeded in bringing a purchaser to the vendor, but the purchaser had not entered into any contract at all with the vendor, because of those two terms: the first, "subject to contract," meant, of course, that the actual terms would have to be stated in detail, and the second, "subject to a surveyor's report," was intended to reserve the purchaser's right until she was satisfied as to the structure of the house, which would of course include the drains.

Having got as far as that on July 3, Mrs. Campbell turned to the persons who had hitherto been her advisers and had carried out construction work or repairs for her—namely, the building construction department of Harrods, Ld. She went to them and asked them to make a report to her on this property, "Blythswood," of which she was contemplating the purchase. A representative of Messrs. Harrods went down to Ascot, and we find that he sent a telegram, of July 12, "Drains very bad, approximate 400*l.* to put in order"; and he followed that up with a letter to the same effect. Mrs. Campbell then asked him for an estimate, and he made a more or less roughly detailed report of what would be necessary, on which he based the estimate of cost. That report is dated July 15. Pausing there, that meant, of course, that Mrs. Campbell had materials in her possession which would justify her in saying: "I cannot give so much as 7500*l.*, by reason of the survey which shows that the property is not worth the full sum of 7500*l.*"

Some correspondence follows, but at that time, it must be stated in fairness to Messrs. Harrods, the estate department had no knowledge whatever that the building department had been called into activity, and equally the building department had no knowledge whatever that Mrs. Campbell had been brought into touch with the vendor by their estate agency department.

Mr. Thorp quite fairly and quite rightly makes it abundantly plain in this Court, as he had done at the trial, that there is no charge against Messrs. Harrods of fraud or mala fides; he accepts the position that they acted throughout quite bona fide but in ignorance of the true position of the two departments towards each other or towards the purchaser.

Then comes some correspondence. First of all, on July 16, the solicitor for Mrs. Campbell, the purchaser, writes to the solicitors for the vendor that the drains are out of order. "In view of the state of the property in other respects it is possible that the drains may require a great deal of repair, and my client considers that this matter should be dealt with by the vendor. If, however, your client would prefer that Mrs. Campbell should have the work done, then there must be a deduction from the proposed purchase price to cover the cost. I should be obliged if you would let me know as soon as possible what your client decides." Then on July 17 the manager of the estate department writes to the vendor's solicitors saying: "We understand from you that she had intimated to your client that she is prepared

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to go on with the matter if she will allow her the cost of putting the drains in order, but we confirm what we stated to you this afternoon, that this request was not made at our suggestion, nor upon our recommendation." At that time, or thereabouts, it was discovered that the two departments were acting in the matter; that the estate office had acted for the vendor, and that Harrods, Ld., were acting also for the purchaser in making this report, and a complaint is made. The letter on behalf of the vendor is written on July 18: "It seems to us that on these facts you are acting as agent for our client and in derogation of your employment by her you are also acting for the purchaser without reference to our client, and it is, of course, an elementary principle of agency that the agent is not entitled to act for both sides without full disclosure to his principal, which has not been done in this case. We have reported your advice to our client and on her instructions we are writing to the purchaser's solicitor informing him that she"—that is the vendor—"is not prepared to make any contribution towards the costs of the drains and we think we ought to put it on record that subject to anything further you may have to add we must hold you responsible should the sale not proceed and in the event of further negotiations rendering it necessary for her to pay any amount we shall of course look to you for such a sum as she may have to pay, and the question of your commission will also require consideration." The matter was placed in the hands of Messrs. McKenna, who are the solicitors to Messrs. Harrods, and on July 23 they reply and set out the facts as to the two departments, which I have already recounted. But they go on: "Our clients are quite satisfied that if any other contractor had been asked to give an estimate for putting the property in order the result would have been the same. In these circumstances we do not know what complaint your client has unless she suggests that our clients' building construction department has made a wrong report." Now, I think that that statement goes beyond the mark, because it was the principal who was entitled to say to the agent: I will, or I will not, allow you to have any dealings with the other side. If the agent has any correspondence of any sort with the person with whom he is negotiating on behalf of his principal that must be with the full knowledge and acquiescence of the principal. But Messrs. Harrods' solicitors go on: "If you feel that this is so [that the report is wrong] we will advise our clients to ask the purchaser to have the drains tested by another firm. As we have stated, the purchase was subject to survey, and consequently whether our clients' building construction department pointed out the deficiencies in the drains or some other person did so, the fact remains that the vendor would have been left in the same position as she now is so far as the purchaser is concerned."

I pause there for a moment, because the facts in this case are very important. It appears to me that that is a clear indication on the part of Messrs. Harrods: it may be, and it is the fact, that we did not know that another department of our company was acting, but as the facts stand, whoever has to make a survey and a report will come to much the same conclusion that we have come to. But if you think, now that you know, it would be better to have an independent survey by an outside surveyor, we are prepared to stand aside. When that letter had been written to the vendor, it appears to me quite clear that she had at that time an election; she could have said: Now I know all the facts, I do prefer that my agents who have so far acted, should have nothing whatever to do with the matter of the survey, I will send the matter to another firm, there must be an independent survey by wholly independent surveyors. She did not do that. What was done was this: the contract was sent backwards and forwards between the solicitors, and, after full knowledge of what had been done by Messrs. Harrods' construction department, a contract was signed on July 31, and the contract price was reduced, not by 400*l.*, not by 248*l.*, which was a subsequent estimate of the outlay necessary upon the drains, but by a sum of 162*l.* 10*s.*, which was deducted from the 7500*l.* Subject to that, and the other terms contained in the contract which had been adjusted,

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there was a firm contract made on July 31 by Mrs. Kent Lemon to sell to Mrs. Campbell.

In the result therefore Mrs. Lemon accepts the services of Messrs. Harrods, acts in accordance with the advice that those services have given her, namely, to sell to Mrs. Campbell, rejects the alternative offered to her of an independent survey, and is content to reduce the purchase price, upon the survey, which was a necessary part or necessary ingredient before the firm contract was signed, by a sum which is much smaller than the original report had adumbrated.

It is said by the defendant that Messrs. Harrods have lost all right to be paid their commission. We are most anxious that nothing should be said in this Court which should in any way derogate from the clear statement that has been made time and again in the Courts. I repeat the words of James L.J. in *Parker* v. *McKenna* (1) : "It appears to me very important, that we should concur in laying down again and again the general principle that in this Court no agent in the course of his agency, in the matter of his agency, can be allowed to make any profit without the knowledge and consent of his principal; that that rule is an inflexible rule, and must be applied inexorably by this Court." The same has lately been said in this Court in *Fullwood* v. *Hurley* (2), and perhaps, as repetition is an early form of emphasis, I may repeat what I said in that case : "if and so long as the agent is the agent of one party, he cannot engage to become the agent of another principal without the leave of the first principal with whom he has originally established his agency." I might quote also the words of Atkin L.J. in *Keppel* v. *Wheeler* (3) ; "I am quite clear that if an agent in the course of his employment has been proved to be guilty of some breach of fiduciary duty, in practically every case he would forfeit any right to remuneration at all. That seems to me to be well established."

In *Keppel* v. *Wheeler* (4) it was decided that the agent who introduces the purchaser has not earned his commission by the mere introduction; that he is not entitled to his

(1) L. R. 10 Ch. 96, 124.
(2) [1928] 1 K. B. 498, 502.
(3) [1927] 1 K. B. 577, 592.
(4) [1927] 1 K. B. 577.

commission until the final contract of sale and purchase has been signed and exchanged; in other words, he has not rendered the services for which he is to be paid his commission, until a firm contract is entered into between the parties; and it is also explained that the agent must render the services to his principal right down to the time when the final and firm contract is signed.

Mr. Thorp has argued the present case upon the footing that Messrs. Harrods have neglected these rules which I have reaffirmed, and that, by reason of that, they have lost all right to commission. It is true, he says, that their introduction of Mrs. Campbell to Mrs. Lemon was the effective cause of the sale, but they have lost their commission because they have undertaken duties which were of a nature in conflict with the original appointment of them as agents to find a purchaser. Their business as agents to find a purchaser was to find a purchaser at the highest price possible, and in fact they found a purchaser who, on their advice, gave less than the 7500*l.* It must, however, be pointed out that on July 3, when the parties had been brought together, there was no contract, because the negotiations were still "subject to contract and to survey," and it was not until a survey had been made that a contract would have been entered into. Now here comes, to my mind, the importance of the offer which was made by Messrs. McKenna to the defendant, the offer to which I have already called attention: "If you feel that this is so, we will advise our clients to ask the purchaser to have the drains tested by another firm"—which means: We will not act upon this, let there be, for the purposes of the survey, a wholly independent person called in. That offer is not accepted: the services are accepted, and the defendant proceeds to enter into a firm contract on July 31, with full knowledge of the facts, after the position had been one in which she could have repudiated the contract, and after she had declined to accept the offer to have a survey made by an independent person.

Have they, then, lost the right to commission? It is right that I should repeat, on behalf of Messrs. Harrods,

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that they make it quite plain that they regret having acted in an equivocal position. Mr. Ford, who negotiated the sale to Mrs. Campbell, says this: "It would be wrong for us to act for both vendor and purchaser"; and he also says this: "I never said anything to Mrs. Campbell or Mrs. Lemon about the drains, and knew nothing about the condition." And the manager of the estate office, Mr. Robinson Steele Smith, agrees that the telegram of July 12 would tend to diminish the price and would be in the interest of the purchaser.

Reliance has been placed on a decision of Lord Alverstone in *Hippisley* v. *Knee Brothers* (1) as justifying the view that the commission is not recoverable. Lord Alverstone says: "If the Court is satisfied that there has been no fraud or dishonesty upon the agent's part, I think that the receipt by him of a discount will not disentitle him to his commission unless the discount is in some way connected with the contract which the agent is employed to make or the duty which he is called upon to perform." It is said that after that answer to which I have just referred, there was a conflict, and therefore that the principle of that case does not apply. But it must be remembered that the offer was made that Messrs. Harrods should drop out of it, and that offer was not accepted. It appears to me that after that acceptance of the situation, it is not possible for the defendant to impute to Messrs. Harrods that they have lost their right to commission, when she has accepted their services with full knowledge, and rejected the opportunity to put the matter right by having an independent surveyor. If the facts were different, if the whole transaction had gone off and this was an action by Mrs. Lemon for a loss of part of the price, different considerations might have applied. If the eventualities contemplated in the letter of July 17, which I have read, had been carried out, again we might have had to apply a different set of rules. But all that we have to consider here is this: whether, in the present circumstances, after the knowledge was conveyed to Mrs. Lemon and she acted as she did, it can be said that Messrs. Harrods have lost their right to

(1) [1905] 1 K. B. 1, 8.

commission. It appears to me, reaffirming the principles which I have already laid down, and which are not in any way contested by Messrs. Harrods, that they are entitled to be paid for their services. It may be observed, too, that the defendant herself feels some difficulty about it, because in the early part of the defence there is a confession that they are entitled at least to some small sum—a sum which was paid into Court.

On these grounds it appears to me that the judgment of Avory J. was right, and that the appeal must be dismissed with costs.

LAWRENCE L.J. I agree, and have nothing to add.

ROMER L.J. I agree. It is said that, when Messrs. Harrods undertook the task of reporting to Mrs. Campbell as to the state of the drains at "Blythswood," and gave an estimate of the cost that would be incurred in putting those drains into order, Messrs. Harrods were entering upon a position in which their interest conflicted with the duty which they owed to Mrs. Lemon, of obtaining the best price for the property in question. I will assume that that was so; but on that assumption, when Mrs. Lemon discovered the position in which Messrs. Harrods had placed themselves, there were two or three courses open to her. She might, in the first place, have put an end to the contract of agency altogether, and taken the house out of the hands of Messrs. Harrods. She might have said: I will have nothing to do with this purchaser that you have introduced, because obviously that purchaser is not going to give me the best price obtainable, having regard to what you have done in the matter of the drains. And she might conceivably, in both those cases, have sued Messrs. Harrods for damages if—and it is a big "if"—she could have proved that she had suffered any. Another course she might have taken would have been to say: I will go on with this purchaser, but only on this condition, that you cease to act for her, and get somebody else to report upon the drains. That was a thing which had been offered to Mrs. Lemon by Messrs. Harrods themselves.

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What she was not entitled to do was to accept the purchaser introduced by Messrs. Harrods, enter into a contract with that purchaser at a price arranged between her own solicitor and the purchaser's solicitor, and then to refuse to pay Messrs. Harrods the commission.

For these reasons I am satisfied that this appeal is without foundation and should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Edward Betteley, Smith & Stirling*
Solicitors for respondents: *McKenna & Co.*

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Workmen's Compensation—Industrial Disease—Certificate of Disablement from Dermatitis—Subsequent Recovery—Employment by other Employers—Exacerbation of the Disease—Second Certificate of Disablement giving the old Date of Disablement—Absence of Notice to old Employers—Conclusiveness of Certificate—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 43—*Workmen's Compensation Rules,* 1926, *r.* 41—*Regulations as to Certifying Surgeons, reg.* 8.

A workman was employed by the respondent as a labourer at breaking up concrete floors and relaying them. After varying periods of employment he ultimately stopped work on July 22, 1929, and on July 30 obtained a certificate from the certifying surgeon that he was disabled from dermatitis contracted during his employment by the respondent, and fixing the date of disablement as March 14, 1929. The respondent paid the workman compensation till November 19, 1929, when the respondent's doctor reported that the workman had practically recovered and was fit for any work except on cement. The respondent then employed the workman at other work till December 24, 1929, when he was dismissed for want of work. After a period of unemployment the workman obtained work in April, 1930, with new employers in unloading lorries containing old iron, rags and bones. By May 2 the dermatitis had become so bad that he had to cease work. On August 28, 1930, he obtained a second certificate from the certifying surgeon that he was suffering from dermatitis, but fixing the date of disablement at the date of the original disablement, March 14, 1929. On this occasion no notice of disablement was given to the respondent, and he remained unaware of the certificate till the workman commenced the present proceedings against him for compensation on September 19, 1930.

The county court judge declined in the circumstances to treat the second certificate as conclusive of the date of disablement in accordance with s. 43, sub-s. 2, of the Act, and on the evidence that the workman had recovered from the disablement of March 14, 1929, by November of that year, dismissed the application. On appeal:—

Held (1.), that as no notice of disablement had been given after the second certificate as required by s. 14 of the Act and r. 41, sub-r. 2, of the Workmen's Compensation Rules, 1926, so that the respondent was never given the opportunity of appealing to the medical referee as provided by reg. 8 of the Regulations as to Certifying Surgeons, the certificate was not conclusive of the date of disablement.

(2.) That, as there was evidence to support the county court judge's finding that the workman had recovered from the old disablement, the appeal must be dismissed.

APPEAL from an award of the judge of the Bow County Court sitting as arbitrator under the Workmen's Compensation Act, 1925.

The workman William John Mason was employed by the respondent Arthur Foster as a general labourer, having entered the employment in July, 1928. His work was to break up concrete floors and relay them. In October, 1928, he began to suffer from dermatitis, but continued to work, wearing gloves, till in December he was discharged for lack of work. From January to March, 1929, he worked on and off with the respondent, until on March 14, 1929, he was again discharged for want of work. On May 6 he obtained work with another employer for four weeks, but later returned to the respondent's employment. After doing only one day's work on concreting he had to stop work on July 22, 1929.

On July 30 he obtained a certificate from the certifying surgeon under s. 43 of the Workmen's Compensation Act, 1925, that he was disabled owing to dermatitis contracted during his employment by the respondent. The date of disablement was fixed as March 14, 1929. The respondent then paid the workman's compensation until November 19, 1929, when the employer's doctor certified that he was practically recovered and was fit for any work apart from working with cement. On March 25 he was taken as a driller's mate, but on December 24 he was discharged owing to lack of work.

The workman obtained no work till April, 1930, when he was employed by Messrs. Blagg & Sons in unloading lorries containing old iron, rags and bones. The dermatitis again became very bad, and on May 2 he was compelled to leave, and was sent by his doctor to hospital. He was discharged from hospital on July 15, 1930, but was still incapacitated. On August 28, 1930, he obtained another certificate from the certifying surgeon stating: "I am satisfied that he [the workman] is suffering from dermatitis due to dust or liquids, being one of the diseases to which the Workmen's Compensation Act applies, and is thereby disabled from earning full wages at the work at which he has been employed; and I certify that the disablement commenced on March 14, 1929, since when he has been back at work in the same industry or employment for periods of two and one months, the end of the last period being December 24, 1929."

On September 19, 1930, the workman commenced arbitration proceedings against the respondent, claiming compensation on the footing of total incapacity since May 2, 1930.

The respondent resisted the claim on the ground that Messrs. Blagg & Sons as the last employers, were the only party against whom compensation was recoverable.

At the hearing evidence was given by Dr. Freeman, the workman's panel doctor, that the rag and bone work would not cause dermatitis but might produce recurrence or exacerbation. Dr. Watt, the physician at Battersea Hospital, said that the reason of the dermatitis was an exacerbation of an original dermatitis. The employer's doctor, Dr. Kennedy, said that he saw the workman in October, 1930, and that he had dermatitis, and was unable to work. He thought the work at Messrs. Blagg & Sons "caused exacerbation of pre-existing condition."

The county court judge said that the respondent contended that compensation should be claimed against Messrs. Blagg & Sons under s. 43, sub-s. 1, of the Act, and that the case was covered by the decision in *Timpson* v. *John Mowlem & Co., Ld.* (1) The applicant had undoubtedly recovered from the disablement in November, 1929, although he never overcame the actual disease. The recurrence of it in active form was caused by the work done in the employment of Messrs. Blagg & Sons, and constituted a new accident for which they were primarily responsible, subject to their right to call on the respondent to contribute. It was urged that the certifying surgeon's certificate given on August 28, 1930, was conclusive against the respondent, but he did not think so. It was never brought to the respondent's notice until after the present proceedings were commenced, so that the respondent had no chance of appealing to the medical referee. He therefore made an award in favour of the respondent.

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(1) (1915) 8 B. W. C. C. 178.

The workman appealed.

Ernest Hancock for the appellant. The question is whether the claim was rightly made against the respondent. In view of the certificate of the certifying surgeon, dated August 28, 1930, certifying that the disablement commenced on March 14, 1929, the claim could only be against the respondent, having regard to s. 43, sub-s. 1 (*c*), of the Workmen's Compensation Act, 1925. There was no appeal from the certifying surgeon to the medical referee, and therefore the date fixed by the certifying surgeon was conclusive under s. 43, sub-s. 2, of the Act. The other side claimed to go behind the certificate, and show that the workman had recovered from his disablement between March 14, 1929, and the date of the certificate. That claim was admitted by the county court judge, but his ground for doing so was insufficient in law. The date of disablement is not a matter to be decided by the Court but by the certifying surgeon, with a right of appeal to the medical referee. If there is no appeal, the certifying surgeon's certificate is conclusive.

[LORD HANWORTH M.R. Ought not notice of the certificate to have been given to the respondent?]

There is no provision in the Act for giving notice of the certificate.

[SLESSER L.J. referred to reg. 8 of the Regulations as to Certifying Surgeons dated June 21, 1907.]

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That gives the employer a right of appeal within ten days of the receipt of notice of disablement required by the Act, or if the notice is not accompanied by the surgeon's certificate, within seven days of the receipt of a copy which the employer is forthwith to require the workman to furnish. It is suggested that there was only one disablement. The object of obtaining the second certificate was to prevent its being said, as in *Timpson* v. *John Mowlem & Co., Ld.* (1), that the disablement from which the workman was suffering was due to his later employment.

[LORD HANWORTH M.R. How can the certificate be conclusive against the respondent when he never knew of it and had no opportunity to ask for it or appeal against it?]

When the application for arbitration was made that contained a notice of the certificate of August 28, 1930. At any time after that the respondent could have asked for a copy of the certificate and, if necessary, have applied for a stay of the proceedings pending his appeal to the medical referee.

[SLESSER L.J. referred to r. 41, sub-r. 2, of the Workmen's Compensation Rules.]

Here it was of the nature of the case impossible to give notice of the accident—that is, in the case of an industrial disease, notice of the disablement—within the time fixed by s. 14 of the Act. Notice was given originally, and that is sufficient.

The difficulty arises from the certificate itself, which instead of giving a new date of disablement on the recurrence of the industrial disease, treats it as all part of the original attack, and gives the date of the original disablement as the date of disablement.

[LORD HANWORTH M.R. Our impression is that the second certificate obtained in August, 1930, is worth nothing, as no notice of disablement was given. In the absence of notice it cannot be claimed that the certificate is one to which the attribute of conclusiveness belongs.]

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(1) 8 B. W. C. C. 178.

If the Court were to so hold, the effect would be to make the Act a nullity. The workman cannot proceed against Blagg & Sons without a certificate fixing the date of disablement at a date after the workman entered their employment. The Act itself makes no provision for notice of disablement being given in such a case as this. Notice has to be given within six months, but this certificate was obtained after that period had expired. The employer had his opportunity of appeal after notice was given in the form of application for arbitration.

Beney for the respondent. The applicant has attempted to use the second certificate to exclude the view that there was a new accident when he was working for Blagg & Sons. But when he left the respondent's employment he was fit for any work apart from working with cement, and the county court judge has found that the recrudescence was due to work done in the service of Blagg & Sons. The real cause of the workman's disablement is something which happened in the employment of Blagg & Sons causing a recrudescence, for which the respondent is not liable except by being brought in to contribute by them. In *O'Neill* v. *Wilsons and Clyde Coal Co.* (1) the accident was an aggravation of a disease just as it really is in this case. The appellant cannot rely on the second certificate as no proper notice was given. The examination of the workman is done privately by the certifying surgeon, but it certainly looks, from the form of the certificate, as if the workman never informed him of his employment by Blagg & Sons.

[He was stopped.]

LORD HANWORTH M.R. This case raises an interesting point which has been put before us very well indeed by Mr. Hancock, and we are obliged to him for his argument; but we have come to the conclusion that the learned county court judge was right.

I must detail the facts, because they are of the essence of the case. Mason was a workman who had been in the employ

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(1) (1926) 19 B. W. C. C. 656.

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of the respondent Foster, and in the course of his work he had contracted dermatitis arising from his handling cement. Subsequently he was employed by the respondent for some six months off and on at other work, but on March 14, 1929, he was definitely turned off by the respondent. He obtained work of loading and unloading bricks for some people called Windsor on May 6 of that same year, but in June, 1929, he returned to the respondent and did some concreting work. He was there until July 22. By that time his hands were so bad that he was unable to work, and he thereupon went before the certifying surgeon, and on July 30, 1929, the certifying surgeon gave him a certificate saying: "I am satisfied that he is suffering from dermatitis due to dust or liquid, being one of the diseases to which the Workmen's Compensation Act applies, and is thereby disabled from earning full wages at the work at which he has been employed; and I certify that the disability commenced on the 14th March, 1929." It is true that the certifying surgeon adds some further statements as to the employment; but all that he had to do was to certify the date on which the disability commenced; and he gave that as March 14, 1929. I think counsel on both sides are to be commended for having treated the subsequent additions made by the certifying surgeon as irrelevant additions to the certificate. After that, the man was paid compensation until he was offered work by the respondent on November 12, and he took the work and went on at full wages until December 24, 1929, when he was discharged on the ground that there was no work which Mr. Foster could give him. The result was that from December 24, 1929, until April, 1930, he was out of work. In April he got work with Messrs. Blagg & Sons, who are, as I understand, rag and bone merchants; and the work that he was engaged upon was that of loading and unloading their vans. After being a short time in this employ his hands got bad again; there was a recrudescence of the dermatitis. On May 5 he was sent to hospital, and remained in hospital, that being the most suitable place to treat him from personal circumstances; and he remained there until July 15. At the end of July a claim for compensation was made against Mr. Foster. Let it be observed that he had finally left Mr. Foster's employ on December 24 previously.

Obviously at that point a question arose whether the workman was still suffering from the continuation of the industrial disease or accident (to give it its statutory description) in respect of which he had secured the certificate on July 30, 1929, just a year before, or whether he was suffering from a new accident, such as is recognized when a recrudescence of a disease occurs in cases such as *O'Neill* v. *Wilsons and Clyde Coal Co.* (1) and *M'Dougal* v. *Summerlee Iron Co.* (2) In such a case an arbitrator may be right in awarding compensation against the new employer upon finding that the new employment had contributed to the disability, although it was also due, in part, to a previous employment. Thus it was in the present case uncertain whether the workman was suffering merely from a continuation of the indisposition arising from the so-called accident of March 14, 1929, or from the results of a fresh accident, consisting of a recrudescence of the disease set up by the work on which the man was employed by Messrs. Blagg & Sons. The man therefore submitted himself to examination again by the same certifying surgeon, and it was for the certifying surgeon to say when the disability arose. On August 28, 1930, the certifying surgeon made a certificate in which he treated the disability from which the man was then suffering not as a fresh accident (a disease caused by the recent employment of the man by Messrs. Blagg & Sons), but as a continuation of the effects of the old accident. He accordingly certified that the disability commenced on March 14, 1929, the date of the old disability, and added these words: "Since which he has been back at work in the same industry and employment for periods of two and one months, the end of the last period being December 24, 1929," words which have again been treated as surplusage. Instead, therefore, of the certifying surgeon saying by his certificate that there had been a new

(1) 19 B. W. C. C. 656.

(2) (1927) 20 B. W. C. C. 419.

accident attributable to the employment by Messrs. Blagg & Sons, he reaffirmed the continuance of the indisposition starting from March 14, 1929. But the workman had been back and at full work long after that date, and been paid the full wages down to December, 1929, by his old employer Foster. No doubt the workman was disappointed in this second certificate. He did not serve any notice in respect of that certificate upon his old employer. When a certificate is given fixing the date of disability, those steps must be taken under the Act which are required upon the happening of an accident; and in order to bring the general scheme of the Act into operation, it is provided by s. 43, sub-s. 3 (*a*), that the disability shall be treated as the happening of the accident, with the consequence that, under s. 14 of the Act, a notice has to be given to the employer. When this notice has been given to the employer he has the right to appeal to a medical referee as provided by reg. 8 of the Regulations as to Certifying Surgeons, and the Workmen's Compensation Rules, r. 41, sub-r. 1, where it is stated that "the notice required by section 14 of the Act shall state the date and cause of the disablement or suspension," and provision is made for the employer obtaining a copy of the certificate. When the certificate has been obtained after notice from the workman, the employer has the right of appeal to a medical referee; and it is only after these provisions have been complied with that the certificate can be treated as conclusive under the section. The workman really treated the certificate of August 28 as a nullity; he did not appeal from it himself, and he did not give notice of it to his employer, but he took out an application for arbitration on September 19, 1930. That came on to be heard on November 10 of last year, and on November 25 the learned judge gave a considered judgment, holding that the workman was not entitled to succeed against Mr. Foster. He held that the case was covered by *Timpson* v. *John Mowlem & Co., Ld.* (1), and he said this: "The recurrence of dermatitis in an active form was caused by the work done by the applicant while in the employ of Messrs.

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(1) 8 B. W. C. C. 178.

Blagg & Sons, and constituted, in my opinion, a new accident for which they are primarily responsible, subject to their right to call in the respondent, and make out, if they can, that the liability is upon the latter." The obvious difficulty in the applicant's way of recovering on that basis is that he had not got a certificate that there had been a new accident, as he might have got, if his application for the second certificate to the certifying surgeon had been successful. We are of opinion that the learned county court judge is right. He was entitled to treat that certificate of August 28, 1930, as not conclusive against the employer, for it had not been used or dealt with by the workman in the way in which a certificate which would become conclusive ought to be treated. I have already pointed out the failure to safeguard the employer's rights by giving due notice of it. If, therefore, as we hold, that second certificate was of no value as a certificate, and was not conclusive, the learned judge had before him facts on which he could hold, and did hold, that the condition of the man was due not to the old accident of March 14, 1929, but to this recrudescence in a different employment which might and could have given rise to a new accident if the workman had had the requisite certificate on which to found a claim for compensation against that employer. When the matter is examined I think the position is clear—namely, that the applicant's failure to succeed before the county court judge is due to the fact that he had not got the document which was a primary necessity to him, namely, a certificate that the recrudescence amounted to a new accident giving rise to a claim for compensation. That not being available, it was open to the county court judge to decide, as he has done, upon the facts before him. We are not therefore in any way called upon to intervene in law, and the appeal must be dismissed with costs.

LAWRENCE L.J. I agree. The learned county court judge has decided this case on the ground that in the special circumstances, the certifying surgeon's certificate, given on August 28, 1930, was not conclusive against the respondent.

He therefore heard evidence, and came to the conclusion on that evidence that the disablement of the workman was an accident which the workman sustained whilst in Messrs. Blagg & Sons employ, and for which they were accordingly primarily responsible, subject to their right to call in the respondent and make out, if they could, that the liability was upon the latter. In my judgment the learned county court judge was right in the conclusion at which he arrived. The certificate of August 28, 1930, as Mr. Hancock has quite frankly stated, was obtained by the workman not, as I had at first assumed, for the purpose of founding a claim against Messrs. Blagg & Sons, but solely because of certain remarks made in *Timpson* v. *John Mowlem & Co., Ld.* (1), by Cozens-Hardy M.R., which I think were misunderstood by the advisers of the workman. In *Timpson's* case (1) the workman had in January, 1913, contracted eczematous ulceration whilst in the employ of Messrs. John Mowlem & Co., Ld. He left that employment, and in June, 1914, entered into the employ of Messrs. Scott & Middleton, when there was an immediate recrudescence of the complaint. The Master of the Rolls, after stating those facts, said (2): "It seems to me beyond all question that, if he [the workman] had applied for a certificate from the certifying surgeon, the certifying surgeon would have been bound to give him one, on the ground that there was an accident, namely, a statutory industrial disease which affected him on a day in 1914." That means that in the circumstances of that case the Master of the Rolls had come to the conclusion that the workman had sustained a new accident in 1914, and that if the workman had gone to the certifying surgeon the certifying surgeon would have been bound to certify that fact, and consequently he held that the first employers, John Mowlem & Co., Ld., were not liable.

Mr. Hancock says that in the present case it was desired to avoid any such question as that arising, and to prevent the learned arbitrator from saying that if the workman had gone to the certifying surgeon in August, 1930, the latter

(1) 8 B. W. C. C. 178.

(2) 8 B. W. C. C. 183.

would have been bound to certify that the workman had sustained a new accident at that date. One of the results of the workman obtaining a certificate from the certifying surgeon that the disablement commenced on March 14, 1929, however, was that the certificate effectually prevented him from making a claim against Messrs. Blagg & Sons. I do not know whether he realized this. However that may be he did not communicate the fact that he had got that certificate either to Messrs. Blagg & Sons or to the respondent, his former employer. Although the certificate was obtained on August 28, 1930, the workman did not commence these proceedings against the respondent until September 19, 1930. There was no excuse for not having given notice of the certificate to the respondent before he commenced these proceedings, thus giving him the opportunity of obtaining a copy of it, and, if so advised, of making an appeal to the medical referee. The certificate was apparently applied for and granted under s. 43 of the Act of 1925, and it is to be observed that the section does not (as in the case of the medical referee's certificate) enact that the certifying surgeon's certificate shall be final or conclusive. Mr. Hancock however contended that the effect of sub-s. 2 of the section is to make the certificate conclusive as to the date of the commencement of the disablement. That sub-section enacts: "For the purposes of this section the date of disablement shall be such date as the certifying surgeon certifies as the date on which the disablement commenced, or, if he is unable to certify such a date, the date on which the certificate is given: Provided," and then there are provisions as to the date in the case of an appeal to the medical referee and in the case of the death of the workman. It is true to say that it has been held in many cases that the finding of the certifying surgeon as to the date of the commencement of the disablement is conclusive, but that has always been in cases where the employers have had an opportunity, before arbitration proceedings were commenced against them, of making an appeal to the medical referee. The whole scheme of the section shows that the legislature contemplated that before the employers were in any way bound by the certificate, they should have the opportunity of appealing against it to the medical referee. In the present case, the workman, for reasons best known to himself, has kept the certificate in his pocket, in the hope that when it was produced in the proceedings which he had brought against the respondent, the latter would be precluded from giving evidence to show that the workman had, since the date of the last certificate, recovered from his disablement, and that the disablement from which he was then suffering was, in fact, a new accident, sustained by him while he was in the employ of Messrs. Blagg & Sons. In my judgment, that is not a legitimate use to be made of a certificate obtained under the section. I abstain from expressing any opinion as to whether the workman had any right to obtain a second certificate from the certifying surgeon at all, as that point has not been argued. Of course, he had the right to obtain a certificate to found proceedings against Messrs. Blagg & Sons if he had sustained a new accident; but it is obvious that that was not the object of his obtaining the certificate, as appears both from the certificate itself and from the fact that he did not give Blagg & Sons any notice of the accident under s. 14. So far as I can see, the sole object of obtaining the certificate was to prevent, if possible, evidence being given in the arbitration proceedings on behalf of the employer to prove that the workman had recovered from the complaint which he had contracted whilst in his employ. Of course, if the certificate was rightly obtained and notice of it had been given to the respondent, he could have appealed to the medical referee, and have proved before him, if it were the fact, that the workman had recovered from that complaint. The device which the workman has employed in this case was designed to prevent any inquiry being made at which the employer would have had the opportunity of being present and putting forward his case.

The certificate was never brought to the respondent's notice until after the arbitration proceedings were commenced, and in these circumstances I entirely agree with the decision of the learned county court judge, that it is not conclusive against the respondent. In my judgment the appeal fails, and ought to be dismissed with costs.

SLESSER L.J. By s. 43 of the Workmen's Compensation Act it is provided that when the certifying surgeon (subject to certain conditions which I shall mention later) has given his certificate that the workman is suffering from one of the scheduled industrial diseases and "the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement," the workman or his dependants shall be entitled to compensation as if the disease was a personal injury by accident. Sub-s. 1 (*e*) says that the employer to whom notice of the disablement is to be given shall be the employer who last employed the workman during the said twelve months in the employment to the nature of which the disease was due. In *Anderton* v. *Markham, Heywood & Co.* (1) Warrington L.J. said (2), speaking of s. 43: "The indication is that industrial disease shall be treated as the happening of an accident, and compensation shall be recoverable from the last employer, to whom notice must be given, and the person who considers himself aggrieved may appeal." In this case it is not seriously disputed that no notice was given to the employer which could satisfy the section. An attempt was made to suggest that the request for arbitration itself constituted a notice under the Act. It is clear that where there is a request for an ordinary arbitration in the case of a normal accident, the request for arbitration could not itself be the notice of the accident; and, indeed, as Mr. Beney has pointed out to us, there is specific provision made in the statutory form of request for arbitration for the date of the notice of the accident to be inserted. It is clear in this case that no notice of the disablement was given to the employer at all. One of the purposes of the notice required by s. 43, sub-s. 1 (*e*), is that by sub-s. 1 (*f*), if the employer is aggrieved by the action of the certifying surgeon, the matter shall, in accordance with regulations made by the Secretary of State, be referred to a medical referee. If the employer receives no notice of the disability, and consequently, no notice of the certificate, he is not in a position to consider whether he will appeal.

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(1) (1924) 17 B. W. C. C. 211.

(2) 17 B. W. C. C. 214.

The provisions of s. 43 have been worked out in a series of rules and regulations. Rule 41 of the Workmen's Compensation Rules modifies the general provisions as to notice in the case of accident, and it is provided in terms that the notice required by s. 14 of the Act shall, in the case of industrial disease, "state the date and cause of the disablement or suspension; and where a certificate of disablement or a certificate of or relating to suspension has been given, a copy thereof shall, on demand, be furnished to the employer." It is quite clear, therefore, that if no notice is given to the employer at all, he is not in a position to ask for a copy of the certificate; reg. 8 of the Regulations as to Certifying Surgeons, provides that "where an employer . . . . is aggrieved by the action of the certifying . . . . surgeon in . . . . refusing to give a certificate . . . . he may . . . . within ten days of the receipt of the notice of disablement . . . . required to be given under the Act, ... if the notice is not accompanied by the certificate of the surgeon," require the workman to furnish him with a copy, and within seven days of the receipt of such copy he may appeal. If the employer has no notice, it is difficult to see how he can decide what he will do within ten days as to demanding a copy, and when he has got a copy, what he will do within seven days thereafter. The consequence of a consideration of s. 43, and the various rules and regulations thereunder, is to bring one to the conclusion that a certificate obtained in this matter, without any notice served on the employer, if not a nullity, is at any rate a certificate which can in no sense be final and conclusive, as would be a certificate properly obtained and properly appealable. In this very case no one knows whether, if the notice had been properly given, an appeal might not have been brought as the result of which the medical referee would have made an entirely different determination of the matter. I come therefore to the conclusion that I must treat the certificate as of no force and effect by reason of the failure to give notice to the employer; and the position that remains is that the learned county court judge, on ample evidence, has found that the recurrence of the dermatitis was caused by work done by the appellant while in the employ of Messrs. Blagg & Sons and constitutes a new accident. My Lords have passed on that matter, and I do not think it is necessary to say more about it; but it is important, as a matter of general principle, to say, as is indeed the opinion, as I understand, of the whole Court, that the certificate of a certifying surgeon, against which the statute has given a right of appeal, is valueless unless the person who has obtained the certificate complies with the statute in such a way as to make it possible for persons affected by the certificate to exercise their appellate rights.

Appeal dismissed.

Solicitors: *F. J. Stewart*; *Clifford-Turner, Hopton & Lawrence.*

H. C. G

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March 17, 30.

NATIONAL SALES CORPORATION, LIMITED *v.* BERNARDI.

[1930. N. 635.]

BERNARDI *v.* NATIONAL SALES CORPORATION, LIMITED.

[1930. B. 1785.]

Bill of Exchange—Bill to Order of Drawer—Indorsement by Third Party in Case of Default by Acceptor—Subsequent Indorsement by Drawer—Indorsement of Third Party above that of Drawer—Right of Drawer to sue Third Party—Validity of Bill—Bills of Exchange Act, 1882 (45 *&* 46 *Vict. c.* 61), *s.* 20.

Bills of exchange drawn to the order of the drawer and accepted were indorsed by a third party with the intention of rendering himself liable if the acceptor did not pay. They were afterwards indorsed by the drawer with the intention of completing them and making them enforceable against the third party if necessary, the signature of the drawer being placed below that of the third party on the backs of the bills. The acceptor not having paid the bills at maturity, the drawer brought an action upon them against the third party as indorser:—

Held, that he was entitled to recover, inasmuch as the fact that his signature instead of being above was below that of the third party on the backs of the bills was a mere inadvertence which did not nullify the intentions of the parties or alter the rights which they would otherwise have had.

Glenie v. *Smith* [1907] 2 K. B. 507; [1908] 1 K. B. 263, judgment of A. T. Lawrence J. followed.

In re Gooch. Ex parte Judd [1921] 2 K. B. 593 reasoning applied.

Jenkins & Sons v. *Coomber* [1898] 2 Q. B. 168; *Shaw (M. T.) & Co.* v. *Holland* [1913] 2 K. B. 15; and *McDonald (Gerald) & Co.* v. *Nash & Co.* [1924] A. C. 625 considered and explained.

TWO CONSOLIDATED ACTIONS tried by Wright J. without a jury.

The following statement of the facts out of which the actions arose is taken substantially from the judgment of the learned judge:—

Allday's Commercial Motors, Ld., were liable to the National Sales Corporation, Ld. (hereinafter called "the corporation"), for 478*l.* It was agreed that the corporation should give time to Allday's on the terms that they gave a cheque for 178*l.*, and for the balance gave six bills of exchange, to be drawn by the corporation on Allday's, and accepted by them, while Mr. Guiseppe Bernardi, who was associated with Allday's, agreed to back, that is, to indorse, them in consideration of time being given, and so as to render himself liable to pay if Allday's did not. The bills were to be dated when the corporation made certain payments amounting to 478*l.* to a third party, that being the money which Allday's were liable to reimburse to the corporation. This was arranged as between all parties at a meeting on November 21, 1929, at which the corporation and Allday's were represented, and Bernardi was present. At that meeting the six bills were prepared. Each of them was for 52*l.* 10*s.*; they were payable respectively one, two, three, four, five and six months after date, and they were all signed by the corporation as drawers, and by Allday's as acceptors, and indorsed by Bernardi, who put his signature on the back of the bills close to the top. The bills were afterwards indorsed by the corporation, whose signature was written on the back of the bills below that of Bernardi. It was arranged that the bills should become effective, that is, be deemed to be delivered, and the corporation should give time to Allday's, only if the latter sent a cheque for 178*l.* That cheque was sent, and, in his Lordship's judgment, was accepted by the corporation, and time thereupon given, so that the bills there and then became effective and were notionally delivered as between all parties, though the cheque, in fact, was not honoured. The bills were duly dated in accordance with the authority given—namely, as on December 12, 1929, on which day the corporation paid the third parties 478*l.*

His Lordship's further findings of fact are stated below in the earlier part of his judgment.

On March 31, 1930, the corporation brought the first of the above mentioned actions against Bernardi, their claim being on the three bills payable respectively one, two and three months after date; but at the hearing of that action the corporation admitted that they could not recover by reason of failure to give notice of dishonour.

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On April 14, 1930, Bernardi brought the second of the above mentioned actions against the corporation claiming: (1.) a declaration that the three bills payable respectively four, five and six months after date were void and of no effect as against him, and (2.) an order for the delivery up to him and cancellation of these bills; while the corporation counterclaimed for the amount of these three bills, and Bernardi put in a defence to the counterclaim.

Sir Thomas Inskip K.C. and *Kenelm Preedy* for the corporation.

Croom-Johnson K.C. and *M. R. Hoare* for Bernardi.

[The nature of the arguments and the authorities cited appear from the judgment of his Lordship.]

Cur. adv. vult.

March 30. Wright J. These are two consolidated actions: in the first the National Sales Corporation, Ld., are plaintiffs, and G. Bernardi is defendant; and in the second Bernardi is plaintiff, and the corporation are defendants. In the first the claim was on three specified bills of exchange, but at the hearing the corporation admitted they could not recover by reason of failure to give notice of dishonour. In the second Bernardi claimed a declaration that three specified bills of exchange were void as against him, and should be delivered up, while the corporation counterclaimed for the amount of these three bills, which were drawn by the corporation to their own order on Allday's Commercial Motors, Ld., accepted by the drawees and indorsed by Bernardi and by the corporation, the indorsement of the corporation being written below that of Bernardi. Each of the bills bore date December 12, 1929, and was for 52*l.* 10*s.*, and they were payable respectively four, five and six months after date. It was agreed that presentation and notice of dishonour should be deemed to have been waived. [His Lordship stated the facts substantially as above set out and continued as follows:] The findings of fact which I have stated above dispose of certain defences raised by Bernardi, and I also find that there is no foundation for the allegation that there was any agreement that Bernardi's liability on the bills was conditional on payment by one Bishop of certain moneys to Allday's in order that Allday's should pay the same to the corporation. In fact, also, Bishop did not owe the moneys alleged. I further find that the bills became effective, and are to be treated as delivered between all parties when the corporation accepted Allday's cheque. I find that Bernardi intended, by indorsing the bills, to render himself liable to the corporation, if the acceptors failed to pay, he having an interest in Allday's, in consideration of time being given.

The defence principally relied on by Bernardi was, that notwithstanding all these facts, the bills were not enforceable against Bernardi, because, when the corporation indorsed them, which they did after receiving them from Allday's and Bernardi, they did so below instead of above Bernardi's signatures. It was not suggested that the indorsements by the corporation were not made in a reasonable time, or that these indorsements were not made with the intention of completing the bills and rendering them enforceable, if necessity arose, against Bernardi, and thus giving effect to the intention that he should be liable in the event of default by Allday's. This default, in fact, happened, because Allday's had gone into liquidation and could not pay.

On the facts as I have found them the case would be precisely covered by *McDonald (Gerald) & Co.* v. *Nash & Co.* (1), but for the relative positions of the signatures on the back. The House of Lords held in that case that a bill to the drawer's order, indorsed by a third party before any indorsement by the drawer, was a bill of exchange, though an incomplete bill, and could be completed by the drawer afterwards indorsing his name, which, in fact, he had done above that of a third party; as the third party had indorsed the bill in order to make himself liable to the drawer, he had impliedly authorized the drawer to give effect to that purpose by adding his own indorsement, that is, to "fill up the omission," as is

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(1) [1924] A. C. 625.

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provided by s. 20, sub-s. 1, of the Bills of Exchange Act, 1882. There is an omission in such a case, because, before the third party indorsed the bill, there should have first appeared on it the indorsement of the drawer, who was also payee, since a bill to drawer's order is payable to the drawer, which would operate as an indorsement from the payee to the third party, even though the third party only held the bill in the act of indorsing it, and never had any property or rights in it. Lord Dunedin in that case thus sums up the position: "Now, on the hypothesis that Nash intended to become liable, which we have found is a fact, then it seems to me that the second part of sub-s. 1 of s. 20 precisely applies; for ex hypothesi the material particular that is wanting is that very indorsation which was afterwards filled in, and this is done as conditioned by sub-s. 2 of s. 20 in accordance with the authority given." (1) And Lord Sumner says that the bill in such a case "is incomplete till it is filled up . . . . and when . . . . filled up, though not before, it becomes retrospectively enforceable, as if it had been complete throughout." (2) Thus a holder who takes a bill not complete and regular on its face, can turn himself retrospectively into a holder in due course by virtue of s. 20, if he fulfils the conditions of the section.

In the present case it cannot be doubted that the corporation, in indorsing, intended to do what was necessary to complete the bill, which, till then, was lacking in their indorsement, and it would be curious if their rights were defeated by a mere blunder committed in putting their name in the wrong place on the back. Such a result would falsify the intention of the parties, and would not readily be upheld by any Court unless compelled so to do by principle or authority; and on general principles, the evidence, in my judgment, is admissible to explain the intention with which a signature is added to a bill, since the order of the indorsements as they physically appear on the back is not conclusive. It was so held in *Penny* v. *Innes* (3), and the same principle was recognized in *Macdonald* v. *Whitfield.* (1) In my judgment effect can here be given to the necessary inference that the corporation indorsed the bills to complete them by adding the necessary indorsement between themselves as drawers, and Bernardi as indorser, and on that basis the position of the signatures is immaterial, and the result is just as if the indorsement by Bernardi had been added to the indorsement of the corporation, after in time, and below in space.

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(1) [1924] A. C. 636. (2) [1924] A. C. 625, 648.

(3) (1834) 1 C. M. & R. 439.

But Mr. Croom-Johnson, on behalf of Bernardi, has contended that I am debarred from so holding by authority. The question of what is the rule where in such cases the drawer's indorsement is out of place, was involved in *Jenkins & Sons* v. *Coomber* (2) in *Glenie* v. *Smith* (3); in *Shaw (M. T.) & Co.* v. *Holland* (4); and *In re Gooch. Ex parte Judd.* (5) It is curious that until the last of these cases the point was only once the subject of express discussion in the judgments; the decisions turn in the main on other considerations. The exception is in the judgment of A. T. Lawrence J., who expressly treats the mere position as immaterial, in *Glenie* v. *Smith.* (3) In *Jenkins & Sons* v. *Coomber* (2) and in *Shaw (M. T.) & Co.* v. *Holland* (4) the judgments seem to turn mainly, if not entirely, on the question whether s. 20 of the Bills of Exchange Act, 1882, can apply to an instrument in which the only or principal omission was the absence of the drawer's indorsement. It seems clear that both these cases were decided on the view, which has now been decisively rejected by the House of Lords in *McDonald (Gerald) & Co.* v. *Nash & Co.* (6), that s. 20 of the Act could only be relied on in cases where the indorsement was on a blank piece of stamped paper, which was the case in *Glenie* v. *Smith* (3), or, at least, could not be relied on where the omission was in regard to the indorsement. In *Jenkins & Sons* v. *Coomber* (2), s. 20 was not actually mentioned either in the arguments or in the judgments, nor was the fact that the drawer's indorsement came below that of the indorser; the sole ratio decidendi was that the latter indorsement was inoperative, because, when it was added, the Bill was not a complete and perfect instrument, for want of the drawer's indorsement, the bill being to drawer's order. In *Shaw* v. *Holland* (1) Hamilton J. seems to treat the case as covered by *Jenkins & Sons* v. *Coomber* (2); and in the Court of Appeal it was argued for the plaintiffs that s. 20 did apply, and that the bill, being wanting in a material particular—namely, the drawer's order—when indorsed by the third party, the drawers had prima facie authority under the section to complete it by their indorsement, which argument was held to be correct by the House of Lords in *McDonald (Gerald) & Co.* v. *Nash & Co.* (3), and that it could not matter in what order the signatures stood on the back. Vaughan Williams L.J. says: "It may be that the plaintiffs might have made the order contemplated by the bill of exchange within a reasonable time after the so-called indorsement by the defendants. I have not to decide any such question, because no such order was effected before action brought. This bill was never really negotiated. This is not a case of a bill in which indorsements appear to be simply in wrong order; it is a case in which the bill was never negotiated" (4); and he seems to treat the case as one in which the third party's indorsement could only be binding if made after an open indorsement by the drawers. It may be that as a further ground in that case it was held that if the drawer had authority to supply his missing indorsement afterwards, it was only an authority to write the signature above that of the indorser. *Glenie* v. *Smith* (5) was distinguished in the last mentioned case as being a case within s. 20. In that case, on one of the two bills in question there, the indorsements were in the wrong order, but A. T. Lawrence J. held that to be immaterial; he said it was to be read with the other as though indorsed to the defendant by the drawer and reindorsed for value. In the Court of Appeal the point was not mentioned, and the case was decided without distinguishing the two bills, simply on the terms of s. 20. The third party in that case had indorsed two blank stamped pieces of paper. Finally, came *In re Gooch* (1), when for the first time this point was fully discussed. The bill in that case had been, after the indorsements, discounted with a bank, who, after the bill was dishonoured, returned it to the creditor and debited his account. The case accordingly differed from others, in that the bill had been negotiated and had come back to the drawer, and on that ground the Court of Appeal were able to distinguish *Shaw* v. *Holland.* (2) But I think that all the members of the Court of Appeal approved of the judgment of A. T. Lawrence J. in regard to the bill which was indorsed in the wrong order; indeed, his words, which I have quoted on that point, are cited with approval by Lord Sterndale. Scrutton L.J. also gives a further reason. He says: "If there had been negotiation in *Shaw* v. *Holland* (2) apparently Vaughan Williams L.J. would have dealt with the wrong order of the indorsements in the same way as A. T. Lawrence J. did in *Glenie* v. *Smith.*" (3) He also relies on the estoppel in s. 55, sub-s. 2 (*c*), of the Act in favour of a "holder." He thus sums up the position: "Now in my view the debtor clearly intended and contracted to make himself liable as indorser for good consideration moving from Judd. He did so not merely as surety for Cardbox, Ld., but as a person interested in that company, giving consideration for time given to that company and himself as a person interested in it. Judd's signature, which would make the debtor liable as indorser, is on the bill, though in the wrong place, and I think there is every reason to enforce the statutory estoppel against the debtor denying to Judd, a subsequent indorsee, that it was a good bill which he indorsed to him. For that is what the debtor wants to say—namely, that the bill he indorsed was a bad bill at the time he indorsed it and obtained time to pay by so doing." (4) If, as I think in this case, this statement is one ratio decidendi adopted by the Lord Justice, it does not depend on the fact that the bill had been discounted with the bank and reindorsed, and the language used seems to apply exactly to the present case. I think Sir Thomas Inskip was right in his submission that even if the precise decision in *In re Gooch* (1) does not cover this case, the reasoning does, and justifies a conclusion in favour of the corporation, and further, that the case of *Glenie* v. *Smith* (2) is a direct authority to the same effect. I may add that in *McDonald* v. *Nash* (3) the House of Lords treat the decision in *Shaw* v. *Holland* (4) as depending on the absence in that case of the appropriate authority, which they treat as present in *Glenie* v. *Smith* (2) and *In re Gooch* (1), both of which cases are approved and applied by the House. It is true that in *McDonald* v. *Nash* (3) no point was expressly considered as to the order of the signatures on the back, but I think that the House must, in approving these cases, have been conscious that the point of the order of the indorsements was involved, and hence, on the authorities I have cited, in such a case as the present, and on such facts as I have found, the mere order of these indorsements should be held not to nullify the intention of the parties, but to be a mere inadvertence, not changing the rights of the parties, and I hold that the corporation are entitled to recover.

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(1) (1883) 8 App. Cas. 733.

(2) [1898] 2 Q. B. 168.

(3) [1907] 2 K. B. 507; [1908] 1 K. B. 263.

(4) [1913] 2 K. B. 15.

(5) [1921] 2 K. B. 593.

(6) [1924] A. C. 625.

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(1) [1913] 2 K. B. 15.
(2) [1898] 2 Q. B. 168.
(3) [1924] A. C. 625.
(4) [1913] 2 K. B. 15, 27.
(5) [1907] 2 K. B. 507; [1908] 1 K. B. 263.

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(1) [1921] 2 K. B. 593, 606.

(2) [1913] 2 K. B. 15.

(3) [1907] 2 K. B. 507; [1908] 1 K. B. 263.

(4) [1907] 2 K. B. 607.

Judgment accordingly.

Solicitors for the Corporation: *Brundrett, Randall & Co.*
Solicitors for Bernardi: *Owen White & Catlin.*

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(1) [1921] 2 K. B. 593.
(2) [1907] 2 K. B. 507; [1908] 1 K. B. 263.
(3) [1924] A. C. 625.
(4) [1913] 2 K. B. 15.

J. R.

THE KING *v.* REGISTRAR OF JOINT STOCK COMPANIES.

Ex parte MORE.

C. A.
1931
April 20.

Gaming—Lottery—Company formed to sell in England Tickets in Lottery authorized by Irish Parliament—Legality—Lotteries Act, 1823 (4 *Geo.* 4, *c.* 60), *s.* 41.

Sect. 41 of the Lotteries Act, 1823, prohibits the sale of tickets or chances in any lottery or lotteries, "except such as are or shall be authorised by this or some other Act of Parliament to be sold":—

Held, that the Imperial Parliament is the only body which can authorize the sale in England of tickets or chances in a lottery. Accordingly, the fact that the Parliament of the Irish Free State has authorized the holding of a lottery does not authorize the sale in England of tickets or chances in that lottery.

A company was formed in England for the sale there of tickets and chances in the Irish lottery:—

Held, that the object of the company was unlawful, and that the Registrar of Joint Stock Companies was right in refusing to register the company.

Decision of Divisional Court affirmed.

APPEAL from a decision of the Divisional Court.

On February 13, 1931, the necessary papers were lodged with the Registrar of Joint Stock Companies, Somerset House, for the purpose of having a company, called the Irish Hospitals (Sweeps), Ld., registered under the Companies Act, 1929. One of the objects of the company, according to the memorandum of association, was "to in England or elsewhere buy, sell, deal in and turn to account, any ticket or tickets, chance or chances, share or shares, of any ticket or tickets, chance or chances, in the lottery known as the Irish Free State Hospitals Sweepstake, organised or held by virtue of the Public Charitable Hospital (Temporary Provisions) Act, 1930, of the Irish Free State, or any other lottery or lotteries held by virtue of the said Act, or any modification thereof, or held by virtue of any other similar statute of the Irish Free State, or any modification thereof." The Registrar refused to register the company on the ground that its object was illegal, whereupon a rule nisi for a writ of mandamus was

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REX
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MORE,
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obtained at the instance of one of the promoters calling upon the Registrar to show cause why a writ of mandamus should not issue commanding him to register the memorandum and articles of association of the company pursuant to s. 12 of the Companies Act, 1929.

On March 9, 1931, the Divisional Court discharged the rule on the ground that the object for which the company was formed was illegal by virtue of s. 41 of the Lotteries Act, 1823. (1)

The applicant appealed.

Beyfus and *C. H. Duveen* for the appellant. The question is whether it is illegal to sell tickets in this country in respect of a lottery which has been authorized by the Parliament of the Irish Free State. Reliance is placed by the Registrar on the language of s. 41 of the Lotteries Act, 1823, which prohibits the sale of tickets "in any lottery or lotteries, except such as are or shall be authorised by this or some other Act of Parliament." Those words have to be construed in the light of the fact that when the Act of 1823 was passed there was one Parliament only for the whole of the United Kingdom, whereas now there is the Imperial Parliament and a separate Parliament for the Irish Free State. We submit that the words of s. 41, "authorised by this or some other Act of Parliament," must include an authorization by the legislative body for that part of the realm within which the lottery is to be held, in this case, the Parliament of the Irish Free State. By the Irish Free State (Agreement) Act, 1922, and the Schedule thereto Ireland was given a Parliament, "having powers to make laws for the peace, order and good government of Ireland," and under that power the Irish Free State Parliament has passed an Act authorizing the holding of a lottery in Ireland: see also the Irish Free State Constitution Act, 1922. Being so authorized the lottery is legal, and to sell tickets for that lottery cannot be illegal.

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(1) Lotteries Act, 1823, s. 41: "If any person or persons shall sell any ticket or tickets, chance or chances, share or shares of any ticket or tickets, chance or chances, in any lottery or lotteries authorised by any foreign potentate or state, or to be drawn in any foreign country, or in any lottery or lotteries, except such as are or shall be authorised by this or some other Act of Parliament to be sold, or shall publish any proposal or scheme for the sale of any ticket or tickets, chance or chances, share or shares of any ticket or tickets, chance or chances, except such lottery or lotteries as shall be authorised as aforesaid, such person or persons shall, for every such offence, forfeit and pay the sum of 50*l.*, and shall also be deemed a rogue and vagabond, or rogues and vagabonds, and shall be punished as such in the manner hereinafter directed."

[GREER L.J. Is it not necessary for you to show that some Act of Parliament since 1823 has authorized the sale of lottery tickets in England ?]

No. When Ireland had a separate Parliament in the eighteenth century, that Parliament more than once delegated to the Lord-Lieutenant the power to authorize lotteries which were recognized as valid in this country. If it can be said that the Irish Parliament recently set up possesses only delegated authority, the Imperial Parliament is bound to recognize and give effect to the laws made by the Irish Parliament as well for this as for other purposes. Further, the language of the long line of statutes dealing with lotteries, beginning with 10 & 11 Will. 3, c. 17, bears out the present contention. An Act of 1718 (5 Geo. 1, c. 9, s. 43) speaks of the evils arising from private lotteries, and it is clear that the legislation was wholly directed against them: see too the recital to 8 Geo. 1, c. 2. Further, the Act 22 Geo. 3, c. 47, after reciting that "whereas all lotteries, except such as are permitted by Act of Parliament, are contrary to law, and punishable under various statutes of this realm," proceeds to enact that "it shall be lawful to buy and sell, within all parts of Great Britain (except within the Universities of Oxford or Cambridge) any ticket or tickets in any lottery or lotteries now authorised or hereinafter to be authorised by any Irish Act of Parliament . . . . in the same manner as if such Irish tickets were tickets in a lottery established by an Act of the Parliament of Great Britain." That statute was, it is true, repealed after the Union, but it shows that the Legislature considered that Irish lotteries were considered as "permitted by Act of Parliament." In view of that line of legislation tickets can lawfully be sold here in connection with a lottery authorized by an Irish statute.

Sir William Jowitt A.-G. and *Wilfrid Lewis* for the respondent were not called upon.

Scrutton L.J. This is a short point involving the construction of s. 41 of the Lotteries Act, 1823. Two gentlemen proposed to sell tickets in England in connection with an Irish lottery. For some reason they did not propose to do this themselves; they proposed to form a private company to do it. It is merely conjecture on my part that this may be due to the fact that the provisions in the Act of 1823 making offenders liable to be punished as rogues and vagabonds do not apply to a company, and so the two gentlemen intending to form this company wished in this way to avoid the risk of being prosecuted under the Act. They accordingly lodged the memorandum and articles of association of the proposed company with the Registrar of Companies, who, when he saw that the object of the company was to sell tickets in a lottery known as the Irish Free State Hospitals Sweepstake, refused to register the company. Thereupon an application was made to the Court for a writ of mandamus directing the Registrar to register the company. To succeed in that application the applicant must show that it is legal to sell in England tickets for the Irish Free State Hospital Sweepstake authorized by an Act of the Irish Free State. The only Act which can be supposed to authorize the selling in England is an Irish Act, but the Irish Parliament has no jurisdiction in England, and that being so, the Irish Parliament cannot authorize lottery tickets to be sold in England. The authority to sell in any place must be given by the Parliament having jurisdiction in that place, and the Imperial Parliament has given no authority to sell lottery tickets in England. The Lord Chief Justice put it shortly to the same effect, saying that "one short and sufficient answer (among others) is that in s. 41 of the Lotteries Act, 1823, the words 'by this or some other Act of Parliament' are not the same as 'by Act of this or some other Parliament.'" That appears an epigrammatic but also a correct way of putting the view which I have expressed. I have listened with interest to the argument of Mr. Beyfus based upon his historical researches, but it appears to me to have nothing to do with construing the plain words of s. 41. The appeal must be dismissed.

GREER L.J. I agree. The question is whether the persons proposing to register the company are persons associated for a lawful purpose. That question involves the interpretation of s. 41 of the Lotteries Act, 1823. At one time there may have been something to be said for this argument, because before I closely examined the section I was inclined to treat it as forbidding sales of lottery tickets in companies that were not authorized by Act of Parliament, whereas it is a prohibition of sales of lottery tickets when the lotteries are not authorized by Act of Parliament. The Act was passed at a time when there was one Parliament for the United Kingdom. When that Parliament was dealing with the sale of lottery tickets it was dealing with the sale of tickets either in Great Britain or in Ireland, and unless a sale was authorized by an Act of Parliament it was made illegal by s. 41. Nearly a century later the Imperial Parliament passed an Act setting up a body in Ireland having the powers of a Parliament, and delegated to it the power to pass Acts to be operative within its jurisdiction, that is to say, to bind people living in Ireland, and to deal with transactions carried out in Ireland, but no power was given to the Irish Parliament to pass statutes authorizing transactions which have been made illegal by the British Parliament either before or after the date of the Union. The language of s. 41 clearly prohibits the sale of lottery tickets in England unless it can be shown that such sale has been authorized by an Act of Parliament. Notwithstanding the argument of Mr. Beyfus and his historical researches, I am not satisfied that the language of the section is susceptible of anything but its plain meaning.

SLESSER L.J. I agree. It is clear that a company cannot be formed whose proposed constitution necessarily involves an offence against the general law. That was assumed in *Rex* v. *Registrar of Companies. Ex parte Bowen* (1) and in

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(1) [1914] 3 K. B. 1161.

Bowman v. *Secular Society.* (1) Mr. Beyfus seeks to obtain a rule for a writ of mandamus requiring the Registrar of Companies to register a company, the object of which the Registrar has said is to carry out something which is contrary to law, because of s. 41 of the Lotteries Act, 1823. That section repeats the language of earlier Acts, making it illegal for a person to sell any ticket "in any lottery or lotteries except such as are or shall be authorised by this or some other Act of Parliament." It is not suggested that the lottery which is now being promoted in the Irish Free State is authorized by the Act of 1823, and therefore Mr. Beyfus has to find some other Act of Parliament which authorizes lottery tickets to be sold in England. He says that it is now lawful to sell these tickets in England, because since the passing of the Irish Free State Constitution Act, 1922, the Irish Free State has power to legislate in that State: see art. 2 of Sch. I. A constitution has been set up for the Irish Free State, and its Parliament in 1930 passed an Act which enables the Minister to sanction schemes for lotteries in Ireland notwithstanding anything to the contrary in any other Act. It still, however, remains for Mr. Beyfus to satisfy the Court that the prohibition in s. 41 of the Lotteries Act, 1923, which forbids the selling of lottery tickets in England, has been in any way affected. I cannot accept the contention that the Irish Act is itself an Act of Parliament within the meaning of the exception in s. 41 of the Lotteries Act, 1823. The distinction is made clear throughout the history of the legislation. Thus, it appears that by a statute of George I. (6 Geo. 1, c. 5) it was enacted by the British Parliament that "the said kingdom of Ireland hath been, is, and of right ought to be subordinate unto and dependent upon the Imperial Crown of Great Britain, as being inseparably united and annexed thereunto; and that the King's Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons of Great Britain in Parliament assembled, had, hath, and of right ought to have full power and authority to make laws and statutes of sufficient force and validity, to bind the Kingdom and people of Ireland." The position thus stated was altered by 23 Geo. 3, c. 28, which provided (inter alia): "that the said right claimed by the people of Ireland to be bound only by laws enacted by His Majesty and the Parliament of that Kingdom, in all cases whatever, ... shall be, and it is hereby declared to be established and ascertained for ever, and shall, at no time hereafter, be questioned or questionable." So after that date the Irish Parliament had power to pass Acts of Parliament, but only for Ireland. In 1800, by the Act of Union (39 & 40 Geo. 3, c. 67), the two Parliaments were united, and thereafter the words "some Act of Parliament" mean an Act of Parliament of the United Kingdom. Now looking at the Lotteries Act, 1823, it is clear to me that the words "some Act of Parliament," mean some Act of the Imperial Parliament. Although it is true that in 1922 an Act of the United Kingdom set up a Legislature for Ireland, that has not altered the meaning of the expression, "Act of Parliament" in the Act of 1823, and it is impossible to say that an Act passed by the Irish Legislature is an "Act of Parliament" within the meaning of s. 41. The Irish Free State Constitution Act, 1922 (Session 2), by Article 2 of the First Schedule provided that "all authority legislative . . . . shall be exercised in the Irish Free State . . . . through the organisations established by or under, and in accord with," the Constitution. It follows that there has been no Act of Parliament within the meaning to be attributed to that expression in s. 41, which authorizes the sale of lottery tickets in England. Permission to sell those tickets in Ireland is limited to Ireland, and therefore the sale in England of tickets in connection with the Irish lottery is as illegal now as it was before the Act of 1922.

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(1) [1917] A. C. 406.

Appeal dismissed.

Solicitors for appellant: *Arthur Benjamin & Cohen.*
Solicitor for respondent: *Solicitor to Board of Trade.*

J. S. H.

1931
April 30.

RICHARDS *v.* PRICE AND ANOTHER.

Gaming—Street Betting—" Loitering . . . . on behalf . . . . of any other person, for the purpose of bookmaking "—Distribution in Streets of Entry Forms of Football Pool—" Bookmaking "—Street Betting Act, 1906 (6 *Edw.* 7, *c.* 43), *s.* 1, *sub-s.* 1.

The respondents, on behalf of N., distributed forms in the street containing an invitation to participate in football pools, together with an entry form and particulars of the terms of participation therein. The recipients who accepted the invitation sent to N. forecasts of the results of football matches specified in the forms, together with a statement of the amount they were prepared to stake thereon. This was not payable until after the matches had been played. The aggregate of these amounts was divided among those sending correct forecasts, less a commission retained by N. :—

Held, that the respondents were guilty of loitering on behalf of N. for the purpose of bookmaking—i.e., the negotiating by N. of bets made between the participants in the pool inter se.

CASE stated by Bristol justices.

At a court of summary jurisdiction holden at Bristol, informations, which by consent were heard together, were preferred by the appellant William Richards, superintendent of police, against the respondents Hugh Price and Albert Henry Mitchell, for that on November 5, 1930, the respondents loitered in certain named streets for the purpose of betting or bookmaking or wagering or agreeing to bet or wager or paying or receiving or settling bets upon certain events or contingencies of and relating to certain football matches within the meaning of s. 1, sub-s. 1, of the Street Betting Act, 1906 (6 Edw. 7, c. 43).

The following facts were proved or admitted. On November 5, 1930, the respondent Price loitered in St. John's Square near the entrance to a factory and there distributed to persons leaving the factory envelopes addressed : " London Football Totalisator (Henry Newton), 92-94 Gray's Inn Road, W.C. 1." Each envelope contained printed forms, one on white and the other on yellow paper. Ninety-one such envelopes were found on Price. Similar facts were found in Mitchell's case, 142 envelopes being found on him. Price was employed by Newton to distribute the said envelopes, and Price employed Mitchell to assist him. The white form contained an invitation by Newton to its recipients to forecast the results of certain football matches to be played on November 8, 1930, and to stake money on the correctness of their forecasts. The form contained the names of football teams, and six columns called pools, in which the backer could insert the names of the teams which would win, lose or draw their matches, and the amount he was prepared to stake in each pool. Credit accounts only were accepted, and backers were to post their money after the matches had been played. The minimum stake on any one pool was 1*s.* and the maximum 1*l.* The total amount in respect of each pool was to be divided between those who had made correct forecasts, in proportion to the sums staked by them, less expenses and 10 per cent. The yellow form accompanied the stake, specifying its amount and the name and address of the sender.

On the white form was a notice by the printers : " Warning. The publishers desire to warn investors against betting on coupons other than those bearing the imprint of the Bancroft Press, Hitchin, which was established in 1873, and supplies printing and football coupons to reliable bookmakers only." The justices dismissed the informations, and the appellant appealed.

Leslie Collins for the appellant. The justices were wrong. The question is whether the respondents were loitering " on behalf either of [themselves] or of any other person, for the purpose of bookmaking, or betting " within the meaning of s. 1, sub-s. 1, of the Street Betting Act, 1906. They were betting on behalf of Newton. The case of *Dunning* v. *Swetman* (1) shows that if what the respondents did was a substantial part of the business of betting it was within the Act. What they did was on behalf of Newton to communicate the terms upon which persons might bet, and to supply the forms upon which the bets might be recorded and made effective. The betting was between the participants in these pools inter se—*Attorney-General* v. *Luncheon and Sports Club* (1)—through the agency of Newton, each participant betting that his forecast would be correct.

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(1) [1909] 1 K. B. 774, 777.

[*Yeudall* v. *M'Quilkie* (2) was also referred to.]

The respondents were loitering "on behalf . . . . of [Newton], for the purpose of bookmaking." The Act of 1906 does not define either "bookmaking" or bookmaker. But by s. 18, sub-s. 1, of the Finance Act, 1926 (16 & 17 Geo. 5, c. 22), "bookmaker" is defined as meaning "any person who, whether on his own account or as servant or agent to any other person, carries on, whether occasionally or regularly, the business of receiving or negotiating bets." That can be used as a guide in interpreting the Act of 1906. The respondents carried on on behalf of Newton the business of negotiating bets.

W. J. M. Dennis for the respondents. The transaction into which the recipients of these forms were invited to enter was not a betting transaction. In *Thacker* v. *Hardy* (3) Cotton L.J. said: "The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature—that is to say, if the event turns out one way A. will lose, but if it turns out the other way he will win." That is, that each party to the transaction must either win or lose. In these pools all may win or all may lose. In the former event each participant just gets his money back less Newton's commission; in the latter case he neither gets his money back nor loses it, except that portion which constitutes the commission, the balance being held over to the next pools. This is more in the nature of a sweepstake, which may be defined as a prize won in a race in which all the stakes are taken by the winners.

[HUMPHREYS J. This may be both a betting transaction and a sweepstake.]

No, because in betting one of the parties must lose.

[*Reg.* v. *Hobbs* (4) was also referred to.]

(1) [1929] A. C. 400.
(2) 1928 S. C. (J.) 54.
(3) (1878) 4 Q. B. D. 685, 695.
(4) [1898] 2 Q. B. 647.

If this was a betting transaction the betting was between the participants in the pools inter se, not with Newton—*Attorney-General* v. *Luncheon and Sports Club* (1), and s. 1, sub-s. 1, of the Act of 1906 only contemplates betting with the loiterer himself or his principal. The respondents were only acting on Newton's behalf to offer his services, and the recipients of these forms did not enter into the transaction until a later stage, for only those of them who used the forms were participants, and many may have thrown them away. The respondents were not authorized to act as agents for those taking part in the pools. The respondents were in the position of persons selling newspapers containing competition coupons. All they did was on Newton's behalf to invite people to subscribe to these pools and to inform them that Newton would hold the money.

Collins in reply. The forms did not specify with whom bets could be made, but they did specify the agent through whom they could be made. Newton was the agent acting for all parties. Newton impliedly described himself as a bookmaker by setting out on his forms and thereby adopting the "warning" of the printers stating that they supplied "reliable bookmakers" with printing, i.e., that he had been supplied with these forms in his character as a bookmaker.

LORD HEWART C.J. In our opinion this appeal ought to be allowed. It is not necessary to read the case again, but when one looks at s. 1, sub-s. 1, of the Street Betting Act, 1906, I think there are materials which are sufficient to support the conviction of the respondents on the ground that they were loitering in the streets on behalf of Newton for the purpose of betting, that betting being, not with Newton himself, except in exceptional cases, but among the various members of the public who were minded to accept the invitation to take part in these pools.

But apart altogether from that ground I think it is obvious that the respondents were loitering for the purpose of bookmaking on behalf of Newton. It is true that the Act does not define "bookmaking," although the word is used in s. 1, sub-s. 1, but I think that when s. 18, sub-s. 1, of the Finance Act, 1926 (16 & 17 Geo. 5, c. 22), defined "bookmaker" as meaning "any person who, whether on his own account or as servant or agent to any other person, carries on, whether occasionally or regularly, the business of receiving or negotiating bets, or who in any manner holds himself out or permits himself to be held out in any manner as a person who receives or negotiates bets," it was not in any degree altering the meaning of that expression, but was merely stating what a bookmaker is. I am satisfied on the argument of Mr. Collins for the appellant and on the documents to which he has directed our attention, that in one aspect of the matter, Newton was playing the part of a bookmaker, and that the respondents were loitering in the streets on his behalf for the purpose of bookmaking. I refrain from discussing other and more debatable matter, and on the above grounds think that this appeal ought to be allowed.

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(1) [1929] A. C. 400.

AVORY J. I am of the same opinion. I think that it is possible that the conviction might have been recorded on the ground contended for by the appellant—namely, that this was a scheme for betting to be carried on inter se by the people who took part in these pools and that the respondents were using the streets for the purpose of informing those among whom they distributed the forms of the means whereby and the terms whereon they could bet with each other through the medium of Newton. Although the case of *Dunning* v. *Swetman* (1) may be distinguished from the present case on the ground that in that case the handbills distributed contained an offer to give certain odds and that the judgment proceeded upon the ground that the recipients thereof were being invited to bet and were being given information of the terms upon which Morton, the principal of the respondents, would bet with them, I think that in principle that case applies here when once it has been found that these pamphlets contained an invitation to any person to bet, either with each other or with Newton, the principal employing these men.

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(1) [1909] 1 K. B. 774.

I also agree, however, that it is more clear that a conviction should have been recorded on the ground upon which my Lord has based his judgment—namely, that the respondents were loitering on behalf of Newton for the purpose of bookmaking, because Newton has impliedly described himself as a bookmaker, and because he clearly is one on the definition in s. 18, sub-s. 1, of the Finance Act, 1926.

HUMPHREYS J. I agree that the appeal should be allowed. I was myself attracted by the argument of Mr. Dennis for the respondents, that the words in s. 1, sub-s. 1, of the Act of 1906, " on behalf either of himself or of any other person," indicate that the betting or the purpose of the loitering must be betting with the loiterer himself or with the person on whose behalf he is loitering. I prefer to express no final opinion on that point because it is unnecessary, as I agree that the respondents have brought themselves within the language of s. 1, sub-s. 1, as loitering on behalf of Newton for the purpose of Newton bookmaking.

Appeal allowed.

Solicitors for appellant: *Robins, Hay & Waters, for Town Clerk, Bristol.*

Solicitors for respondents: *Church, Adams, Tatham & Co., for Meade-King & Co., Bristol.*

W. L. L. B.

1931
April 28, 29.

DAVIS AND OTHERS *v.* PARKER.

Gaming—Unlawful Gaming—Invitation to Public to play lawful Games—Common Gaming House—Gaming Houses Act, 1854 (17 *&* 18 *Vict. c.* 38), *s.* 4.

The appellants, proprietors of a place known as "Fun Fair," invited the public to resort thereto, and the public did so resort, for the purpose of playing for money at a game with an automatic machine called the "Circle of Skill," which the justices found was a game of skill:—

Held, that the appellants could not be convicted of permitting the above place to be opened for the purpose of unlawful gaming.

CASE stated by Southampton justices.

At a court of summary jurisdiction holden at Southampton on September 8, 1930, informations were preferred by the respondent William Henry Parker, chief inspector of police, under s. 4 of the Gaming Houses Act, 1854 (17 & 18 Vict. c. 38), against the appellants G. J. Davis, G. R. Davis and C. H. Davis, for that they on July 26, 1930, being owners of a place known as "Fun Fair," did knowingly and wilfully permit the same to be opened for the purpose of unlawful gaming.

Upon the hearing it was proved or admitted that the said place was open to the public and contained automatic machines of various types operated by coins placed in slots. One only of these machines, called "The Circle of Skill," permitted the operator to win anything. In that machine the operator placed a penny in the slot and thereby released a ball which fell into a circular plate studded with spikes, which could be moved by the operator in an endeavour to direct the ball into one of three winning cups. If successful he got his penny back and also another ball with which to continue to play. There was no evidence that any operator had so successfully played, but it was proved that on one occasion the ball did fall into a winning cup without the plate being moved. There was no evidence that chance predominated or that the chances were not alike favourable to all the players, including the appellants. On the said date the said place was open to any members of the public who chose to enter, and numbers, including children were there at that and other times.

The justices convicted the appellants, being of opinion that the public was invited by the appellants to resort to the place and did resort thereto to play games thereon, and that the playing of games upon the place to which the public was invited and did resort, irrespective of the lawfulness of the games so played, constituted the place a common gaming house.

The appellants appealed.

Trapnell K.C. and *R. H. Bayford* for the appellants. The justices were wrong. They have apparently held that it is immaterial to inquire what the games played were, but that if the public was invited to play games, the place to which the public was so invited became a common gaming house in which the playing of any game automatically became unlawful gaming. This goes beyond anything that has previously been decided. Hitherto the question has always been whether the games played were games in which chance predominated, or whether the chances were not alike favourable to all the players, including the proprietors, in other words, were they games of skill or chance. In this case no inquiry into these matters was made and there was no evidence thereon.

[*Thompson* v. *Mason* (1) was referred to.]

Walter E. Lloyd for the respondent. The opinion of the justices as set out in the case cannot be supported by authority, but there is sufficient on their findings to support the conviction. This was a common gaming house because it was " a house in which a large number of persons are invited habitually to congregate for the purpose of gaming ": per Hawkins J. in *Jenks* v. *Turpin*. (2) Gaming is playing games for money : *Reg.* v. *Ashton* (3) per Lord Campbell and *Dyson* v. *Mason*. (4) The appellants invited the public to play this game, the " Circle of Skill," which was a game played for money or money's worth. In *Roberts* v. *Harrison* (1) playing with a machine which was practically identical with this machine was held to be unlawful gaming. It is unnecessary to show that this was a game in which chance predominated, because this being a common gaming house, playing at this game therein automatically made it unlawful gaming.

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(1) (1904) 90 L. T. 649.
(2) (1884) 13 Q. B. D. 505, 516.
(3) (1852) 1 E. & B. 286, 289.
(4) (1889) 22 Q. B. D. 351.

[AVORY J. referred to *Pessers, Moody, Wraith & Gurr, Ld.* v. *Catt.* (2)]

[*Rex* v. *Hendrick* (3) ; Halsbury's Laws of England, vol. xv., p. 287, para. 584, and p. 290, para. 588, and Paterson's Licensing Acts, 41st ed., p. 758, were also referred to.]

Bayford in reply. No doubt a game played in a common gaming house for money may be unlawful, but it is necessary, before saying that the play is unlawful, to first establish that the house is a common gaming house, which the respondent has failed to do. It is necessary to show more than that a game was played for money. The quality of the game must be inquired into to see whether it is one of skill or chance. In this case no evidence on the point was given.

LORD HEWART C.J. In this case the Southampton justices heard two informations against the appellants under s. 4 of the Gaming Houses Act, 1854, charging that they being the owners of a place known as "Fun Fair" did on July 26, 1930, knowingly and wilfully permit it to be opened for the purpose of unlawful gaming. The only authority relied on by the respondent was *Jenks* v. *Turpin* (4), and notwithstanding the decision in *Pessers, Moody, Wraith & Gurr, Ld.* v. *Catt* (2) the justices apparently held that the decision of the former case was sufficient authority to justify them in convicting the appellants. The justices expressed the opinion that the public was invited by the appellants to resort to this place and did resort thereto to play games thereon, and that the playing of games upon the place to which the public was invited and did resort, irrespective of the lawfulness of the games so played constituted the place a common gaming

(1) (1909) 101 L. T. 540.
(2) (1913) 77 J. P. 429.
(3) (1921) 37 Times L. R. 447.
(4) 13 Q. B. D. 505.

house. Mr. Lloyd, who has argued this case so clearly and carefully, admits that there is no existing authority in the mass of authority relating to gaming which goes that length, but he invites the Court to take a new step in support of the conviction. I content myself with saying that there is no authority upon which this conviction can be supported, and this appeal must be allowed.

AVORY J. I agree. Upon the finding of the justices that there was no evidence that chance predominated or that the chances were not alike favourable to all the players of the "Circle of Skill," including the appellants, I think that the proper inference is that this was a game of skill, and with regard to games of skill the authorities seem quite clear, particularly the case of *Pessers, Moody, Wraith & Gurr, Ld.* v. *Catt.* (1) The headnote, which summarizes the judgment, is as follows: "By an agreement made between the plaintiffs and the defendant, the plaintiffs agreed to supply and the defendant agreed to take on hire certain automatic machines. The machines were worked as follows: The operator having placed a penny in the slot pressed a spring which released a ball. The ball thereupon gyrated among a number of pins. The object of the operator was to catch the ball when it dropped by means of a cup attached to a movable bar. It entirely depended upon the skill of the operator in placing the cup in the right position for catching the ball. In an action claiming three weeks' rent of the machines, held, that there was a dominant element of skill in the use of the cup, that it was therefore a game of skill, and that the plaintiffs were entitled to succeed." That view is also borne out by the recital in the Gaming Act, 1845 (8 & 9 Vict. c. 109): "Whereas the laws heretofore made in restraint of unlawful gaming have been found of no avail to prevent the mischiefs which may happen therefrom, and also apply to sundry games of skill from which the like mischiefs cannot arise." It was then enacted: "That so much of [33 Hen. 8, c. 9] . . . . . whereby any game of mere skill, such as bowling, coyting, cloyshcayls, half bowl, tennis, or the like, is declared an unlawful game . . . . shall be repealed . . . ." As Hawkins J. said in *Jenks* v. *Turpin* (1), referring to the above enactment, "Nothing could more clearly indicate the intention of the legislature to legalise to all persons and at all times *mere games of skill*, but to preserve in their integrity all the penalties which then attached to the playing at unlawful games anywhere, *or gaming at all* (even at lawful games) *in common gaming-houses*." The same view, I think, is apparent in *Rex* v. *Hendrick* (2), a case tried with a jury, where in the judgment of the Court it was pointed out that the only relevant question which ought to have been left to the jury was whether the game there in question was one of mere skill. I agree therefore with the opinion expressed by my Lord, that the decision of the justices cannot be supported when they say that it is sufficient to show that the public has been invited to resort to a place to play a perfectly lawful game. The decision of the justices in the terms in which it is set out in the case stated would apply to an invitation to resort to such places as Lord's or the Oval cricket grounds. I cannot think that that is a correct result from anything that was said in *Jenks* v. *Turpin* (3), and I agree that the appeal should be allowed.

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(1) (1913) 77 J. P. 429.

HUMPHREYS J. I agree that the appeal should be allowed. The question which the justices have asked this Court to decide is "whether upon the above statement of facts we came to a correct determination and decision in point of law." Their determination and decision is set out in the case under the head of "Opinion," and has been read. I agree that it is an erroneous statement of law, and that being so these appellants ought not to have been convicted.

Appeal allowed.

Solicitors for appellants: *Speechly, Mumford & Craig, for Lamport, Bassitt & Hiscock, Southampton.*

Solicitors for respondent: *Sharpe, Pritchard & Co., for Ronald H. Meggeson, Southampton.*

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(1) 13 Q. B. D. 505, 521.

(2) 37 Times L. R. 447.

(3) 13 Q. B. D. 505.

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THE KING *v.* THE LONDON COUNTY COUNCIL.

Ex parte THE ENTERTAINMENTS PROTECTION ASSOCIATION, LIMITED.

Certiorari—Cinematograph Exhibition—Grant of Licence—Powers of County Council—Permission to open Premises on Sunday—Sunday Observance Act, 1780 (21 *Geo.* 3, *c.* 49), *s.* 1—*Cinematograph Act,* 1909 (9 *Edw.* 7, *c.* 30), *ss.* 1, 2, 3—*London County Council* (*General Powers*) *Act,* 1923 (13 *&* 14 *Geo.* 5, *c. vii.*), *s.* 16.

By s. 2, sub-s. 1, of the Cinematograph Act, 1909, a county council may grant licences to persons to use premises for the exhibition of pictures or other optical effects by means of a cinematograph on such conditions and under such restrictions as the council may determine.

By s. 16 of the London County Council (General Powers) Act, 1923, the London County Council may on the application of a licensee holding a licence under the Cinematograph Act, 1909, modify or waive any of the conditions or restrictions attached by the Council to the licence.

By s. 1 of the Sunday Observance Act, 1780, any house, room, or other place which shall be opened or used for public entertainment or amusement upon any part of the Lord's Day called Sunday, and to which persons shall be admitted by the payment of money, shall be deemed a disorderly house; and the keeper of the house, room, or place shall forfeit the sum of 200*l.* for every day that the same shall be opened or used as aforesaid on the Lord's Day; and other penalties are imposed upon the person managing or conducting such an entertainment, and upon doorkeepers collecting and receiving money or tickets from persons assembling at such house, room or place on the Lord's Day.

It was the practice of a certain County Council, in granting licences to use premises for cinematograph exhibitions, to impose the condition that the premises should not be so used on Sundays, Christmas Day or Good Friday; but also to entertain applications for permission to open the premises for cinematograph entertainments on those days.

A company applied for a licence to open and use premises for cinematograph entertainments, and also for permission to open the premises for such purposes on Sundays, Christmas Day and Good Friday. In compliance with this application the County Council made an order to the effect that, "subject to arrangements at the premises being completed to its satisfaction, the Council will take no action for the present in the event of the above named premises being opened for cinematograph entertainments on Sundays, Christmas Day and Good Friday as from and including Sunday, July 6, 1930, provided: (i.) that a sum of 35*l.* be paid to charity in respect of each Sunday, Christmas Day and Good Friday on which the premises are opened for cinematograph entertainments." The permission was also subject to conditions relating to

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the auditing of receipts and expenses, the character and hours of the entertainments, and the employment of servants:—

Held, that a writ of certiorari should issue to bring up and quash the order of the County Council as having been made without jurisdiction, the council having no power to dispense with the provisions of the Sunday Observance Act, 1780.

Judgment of the King's Bench Division affirmed.

APPEAL from the order of a Divisional Court making absolute a rule nisi for a writ of certiorari to issue directed to the London County Council to remove into the King's Bench Division a certain order of the said Council dated May 29, 1930, granting permission for certain premises known as the Streatham Astoria to be open for cinematograph entertainments on Sundays, Christmas Day and Good Friday, and that the said order when returned should be quashed.

In compliance with an application by a company called the Streatham Properties, Ld., in April, 1930, and in pursuance of powers vested in them by s. 2 of the Cinematograph Act, 1909 (1), the London County Council on May 14, 1930, granted to the said applicants a licence to use premises known as the Streatham Astoria for the exhibition of pictures or other optical effects by means of a cinematograph or other similar apparatus. The licence was to be in force until December 31, 1930, and was granted subject to the following among other terms and conditions: "That the said premises be not opened on Sundays, Christmas Day or Good Friday for cinematograph entertainments."

Notwithstanding the provisions of the Sunday Observance Act, 1780 (1), and the conditions imposed upon the licensee

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(1) Cinematograph Act, 1909 (9 Edw. 7, c. 30), s. 1: "An exhibition of pictures or other optical effects by means of a cinematograph, or other similar apparatus, for the purposes of which inflammable films are used, shall not be given unless the regulations made by the Secretary of State for securing safety are complied with, or, save as otherwise expressly provided by this Act, elsewhere than in premises licensed for the purpose in accordance with the provisions of this Act."

Sect. 2, sub-s. 1: "A county council may grant licences to such persons as they think fit to use the premises specified in the licence for the purposes aforesaid on such terms and conditions and under such restrictions as, subject to regulations of the Secretary of State, the council may by the respective licences determine."

Sub-s. 2: "A licence shall be in force for one year or for such shorter

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by the form of the licence, it has been the practice of the Committee, to whom have been delegated the powers of the London County Council under the Cinematograph Act, 1909, to entertain applications for permission to exhibit cinematograph pictures on Sundays, Christmas Day and Good Friday, and the Committee have made and published regulations to be observed by applicants for this permission. The regulations are headed "Administrative County of London. Sunday Cinematograph Entertainments. Rules made by the Theatre

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period as the Council on the grant of the licence may determine, unless the licence has been previously revoked as herein-after provided."

Sub-s. 5: "There shall be paid in respect of the grant, renewal, or transfer of a licence such fees as the County Council may fix, not exceeding in the case of a grant or renewal for one year one pound, or in the case of a grant or renewal for any less period five shillings for every month for which it is granted or renewed, so however that the aggregate of the fees payable in any year shall not exceed one pound, or, in the case of transfer, five shillings."

Sect. 3: "If the owner of a cinematograph or other apparatus uses the apparatus, or allows it to be used, or if the occupier of any premises allows those premises to be used, in contravention of the provisions of this Act or the regulations made thereunder, or of the conditions or restrictions upon or subject to which any licence relating to the premises has been granted under this Act, he shall be liable, on summary conviction, to a fine not exceeding twenty pounds, and in the case of a continuing offence to a further penalty of five pounds for each day during which the offence continues, and the licence (if any) shall be liable to be revoked by the County Council."

London County Council (General Powers) Act, 1923 (13 & 14 Geo. 5, c. vii.).

Sect. 16: "In the case of any licence granted by the Council," (i.e. the London County Council—see s. 3) "under the provisions of" (among others) "the Cinematograph Act, 1909, or any Act amending any of those Acts the Council at any time whilst the licence is in force may in their discretion on the application of the licensee modify or waive any of the terms conditions or restrictions attached by the Council or attach new or substituted terms conditions or restrictions to such licence and the terms conditions or restrictions as modified and any new or substituted terms conditions or restrictions attached under the powers of this section shall be as binding and enforceable in all respects as if they had been attached to the licence at the grant thereof."

Sunday Observance Act, 1780 (21 Geo. 3, c. 49), s. 1: "From and after the passing of this present Act, any house, room or other place, which shall be opened or used for publick entertainment or amusement, or for publickly debating on any subject whatsoever, upon any part of the Lord's Day called Sunday, and to which persons shall be admitted by the payment of money or by

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and Music Hall Committee of the London County Council." By rule 2: "An application for permission to open premises for cinematograph entertainments on Sundays, Christmas Day and Good Friday must be made by the licensee of the premises or by the applicant for the grant of a licence therefor." By rule 3: "Notice of any application when given on behalf of a limited liability company or other corporate body must be signed by a responsible officer of the company or body and must be accompanied by a certified copy of the minute of the company or body authorizing the officer to make the application on behalf of the company or body. Rule 7, under the heading New Applications, contained the following regulations:—

"(*a*) Application for permission to use premises for cinematograph entertainments on Sundays, Christmas Day and Good Friday must be submitted upon the approved form to the Clerk of the Council.

"(*b*) An application shall not be considered until after the lapse of at least four weeks after the date on which the application is made.

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tickets sold for money, shall be deemed a disorderly house or place; and the keeper of such house, room or place shall forfeit the sum of two hundred pounds for every day that such house, room or place shall be opened or used as aforesaid on the Lord's Day, to such person as will sue for the same, and be otherwise punishable as the law directs in cases of disorderly houses; and the person managing or conducting such entertainment or amusement on the Lord's Day, or acting as master of the ceremonies there, or as moderator, president or chairman, of any such meeting for publick debate on the Lord's Day, shall likewise for every such offence forfeit the sum of one hundred pounds to such person as will sue for the same; and every door keeper, servant or other person who shall collect or receive money or tickets from persons assembling at such house, room, or place on the Lord's Day, or who shall deliver out tickets for admitting persons to such house, room or place on the Lord's Day, shall also forfeit the sum of fifty pounds to such person as will sue for the same."

Sect. 2: "And whereas, by reason of the many subtle and crafty contrivances of persons keeping such houses, rooms or places as aforesaid, it may often be difficult to prove who is the real owner or keeper thereof: Be it enacted . . . . that any person who shall at any time hereafter appear, act or behave him or herself as master or mistress, or as the person having the care, government or management of any such house, room or place as aforesaid, shall be deemed and taken to be the keeper thereof." . . . .

"(*c*) On the date on which application is made, a notice of application on the approved form printed in large type, known as 'Two-line English Roman,' must be affixed, and, until the application has been dealt with, maintained upon the principal outer door or other conspicuous part of the premises in respect of which application is made, or in a conspicuous position on the site of the proposed premises, at the height of five feet above the footway, so that the notice can be seen and read by persons in a public street or place.

"(*d*) Within seven days of the submission to the Council of the application, an advertisement in the approved form, giving notice of the application, must be inserted in three newspapers circulating generally throughout the county, at least one of which must be a newspaper published in the locality in which the premises are situated or proposed to be erected, and one copy of each such newspaper containing the advertisement must be forwarded to the Clerk of the Council.

"(*e*) Not less than seven days' notice in writing of the application must be given to the Commissioner of Police of the Metropolis, New Scotland Yard, S.W. 1, or, if the premises in respect of which application is made are situated within the City of London, to the Commissioner of Police for the City of London, 26 Old Jewry, E.C. 2.

"(*f*) Seven clear days at least before the day appointed for the hearing of the application by the Committee, a statutory declaration, on the approved form, that all the requirements prescribed by this rule have been complied with, must be forwarded to the Clerk of the Council."

The following rules related to opposals to applications and the hearing of opposed applications for licences :—

Rule 9. "Any person desiring to oppose an application before the Committee shall give notice of such opposition to the Clerk of the Council and to the applicant as follows : (i.) In the case of a new application for permission to open premises for Sunday cinematograph entertainments in pursuance of rule 7, seven clear days' notice before the day appointed for the hearing by the Committee . . . ."

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Rule 10. "The notice of opposition shall set forth the grounds of opposition, and in cases in which definite offences are alleged, the dates and particulars of such offences. On the hearing of the application it shall not be competent for an opponent to go into any matter not set forth in the notice of opposition."

"12. Any meeting of the Committee at which an opposed application is considered shall be open to the public. The Committee may conduct their deliberations in private.

"13. Every applicant and every person opposing an application shall be heard either personally, or by counsel, or by a solicitor, and shall be entitled to call witnesses.

"14. The order of hearing opposed cases shall be as follows: (i.) If the application is in pursuance of rule 7, the applicant shall open the case and shall be heard either personally or by his counsel or solicitor, and may then call witnesses. Persons opposing shall then be heard either personally or by counsel or by a solicitor, and may then call witnesses. The applicant or his counsel or solicitor, as the case may be, shall then be heard in reply . . . ."

Where an application has been granted the clerk of the Council sends a letter to the applicant in the common form following: "I am directed to inform you that, subject to the arrangements at the premises being completed to its satisfaction, the Council will take no action for the present in the event of the above named premises being opened for cinematograph entertainments on Sundays, Christmas Day and Good Fridays, as from and including Sunday the . . . . day of . . . . provided (1.) that a sum of £ . . . . be paid to charity in respect of each Sunday, Christmas Day and Good Friday on which the premises are opened for cinematograph entertainments . . . . and I am accordingly to ask you to nominate from the Council's approved list of charities a charity to receive the contribution mentioned above."

Expecting to obtain the grant of a licence subject to the condition that the Streatham Astoria should not be opened on Sundays, Christmas Day or Good Friday for cinematograph entertainments, the Streatham Properties, Ld., before the licence was granted—namely, on April 29, 1930, through their representative Henry Thomas Richardson applied to the Council for permission to use the premises for cinematograph entertainments on Sundays, Christmas Day and Good Friday, offering to pay for each of these days on which the premises were so used the sum of 15*l.* towards some charity to be approved by the County Council; and they duly advertised their application. On May 14, 1930, Frank Glenister as secretary for, and on behalf of, the Entertainments Protection Association, Ld., gave notice to the Council of the intention of the Association to oppose the application of the Streatham Properties, Ld., on the following grounds: (1.) That the opening of the Streatham Astoria on Sunday for cinematograph entertainments would be a breach of the Provisions of the Sunday Observance Act, 1780, and that the London County Council in giving the permission applied for would aid and abet a breach of that statute; (2.) that the opening of the premises on Sunday for cinematograph entertainments, as given there on week days, would be injurious to the interests of neighbouring places of public entertainment, which the London County Council will not permit to be opened on Sundays for entertainments as given there on week days.

The application of Streatham Properties, Ld., was heard by the Theatre and Music Hall Committee of the London County Council on May 29, 1930, and was opposed by counsel on behalf of the Entertainments Protection Association. Notwithstanding the opposition, the Committee on the same day made an order granting the application of the Streatham Properties. Notice of the order was sent to the applicant by the clerk of the Council in a letter in the following terms: " 7 June, 1930. To the Secretary, Streatham Properties, Ld., 20 Berkeley Street, Piccadilly, W. 1. Sir, 47–49 Streatham High Road (Streatham Astoria). With reference to your application dated April 29, 1930, on behalf of Streatham Properties, Ld., I am directed to inform you that, subject to the arrangements at the premises being completed to its satisfaction, the Council will take no action for the present in the event of the above-named premises being opened for cinematograph entertainments on Sundays, Christmas Day and Good Friday as from and including Sunday, July 6, 1930, provided (i.) that a sum of 35*l.* (thirty-five pounds) be paid to charity in respect of each Sunday, Christmas Day and Good Friday on which the premises are opened for cinematograph entertainments; (ii.) that a statement certified by an independent auditor possessing professional qualifications showing in detail receipts and expenses in connection with cinematograph entertainments held on Sundays, Christmas Day and Good Friday during the first six months such entertainments are held at the premises be submitted to the Council in due course; (iii.) that the conditions Nos. 1 to 5 (inclusive) contained in the regulation of the Council (copy attached) relating to cinematograph entertainments held on Sundays, Christmas Day and Good Friday be strictly complied with. I am accordingly to ask you to nominate from the Council's approved list of charities the charities to receive the contribution mentioned above . . . . Charities receiving the profits of Sunday, etc., cinematograph entertainments are required to furnish the Council, not later than the first week in each month, with a statement showing the amount received in respect of such entertainments held during the previous month, in order that they may be included in the appropriate statement required to be rendered to the Council." . . . . The rest of the letter contained elaborate instructions relating to the statement of receipts and expenses required by No. ii. of the conditions mentioned above.

The regulation of the Council mentioned in condition iii. was as follows: "Applications for permission to use premises licensed under the Cinematograph Act, 1909, for cinematograph entertainments on Sundays, or other days prohibited by the licence, shall be considered only when the licensee proposes to pay, in respect of each prohibited day on which an entertainment is given to a charity to be approved by the Council a sum representing the actual profit for the day from the cinematograph entertainments at the premises, and gives an undertaking that (1.) the entertainment will be of a healthy character and properly conducted ; (2.) an amount to be determined by the Council as representing the profit from the entertainments will be paid, in respect of each prohibited day on which an entertainment is given, to a charity to be approved by the Council ; (3.) no performance will begin before 6 P.M. or finish later than 11 P.M. ; (4.) no person will be employed on Sundays who has been employed for each of the previous six days in connection with cinematograph entertainments, wherever held, or with any other form of entertainment at the premises for which they are licensed by the Council, and that a notice to that effect will be prominently displayed in a position or positions in which it will be seen by all the staff engaged at the premises ; (5.) the conditions endorsed on the cinematograph licence which are required to be observed on weekdays will be complied with."

On July 31, 1930, the Entertainments Protection Association, Ld., obtained a rule nisi directed to the London County Council to show cause why a writ of certiorari should not issue to remove into the King's Bench Division their order of May 29 on the grounds : (1.) that the London County Council had exceeded their jurisdiction by reason of their taking into consideration an extraneous matter—namely, payments by the applicants for the licence to an approved charity ; and (2.) that their order was in breach of the Sunday Observance Act, 1780.

On December 4, 1930, the London County Council showed cause. The Divisional Court (Avory, Swift and Acton JJ.) made the rule absolute for a certiorari and quashed the order of May 29·

The London County Council appealed. The appeal was heard on Jan. 23, 26, 27, 1931.

Sir F. Boyd Merriman K.C., *Pritt K.C.* and *Engelbach* for the appellants.

Montgomery K.C. and *Sidney Lamb* for the respondents.

The arguments of counsel sufficiently appear from the judgments.

SCRUTTON L.J. This appeal raises questions of some public importance. It is an appeal by the London County Council, from a decision of the Divisional Court, ordering a writ of certiorari to issue to bring up a decision of the Theatres Committee of the London County Council to be quashed. The decision which is ordered to be brought up to be quashed is one in my view permitting, so far as the Council can permit, a cinema theatre at Streatham to open on Sundays, charging for admission.

I understand the decision of the Divisional Court to be that the County Council has purported to grant permission to these applicants to open their premises on Sundays for cinematograph entertainments at which payment is required for admission, and that the London County Council has no power to grant such a permission. I might content myself with saying that I have carefully considered the decision of the Divisional Court and that I entirely agree with it and cannot usefully add anything. But in deference to the argument addressed to us by Sir Boyd Merriman and Mr. Pritt, and to the position of that very important body, the London County Council, I elaborate a little more in detail the reasons why I agree with the decision of the Divisional Court.

There is still on the statute book an Act called the Sunday Observance Act, 1780. The main enactment in that statute is that any house, room, or other place used for public entertainment or amusement to which persons shall be admitted by the payment of money, or by tickets sold fo money, upon any part of the Lord's Day, shall be deemed a disorderly house or place, and certain penalties are imposed which can be recovered by common informers; and, 1780 resembling in some respects 1930, the Act anticipated that there would be many subtle and crafty contrivances of people keeping such houses to get round the Act. Now every judge knows well that if a proposal were made to repeal or amend that Act in Parliament, there would be considerable difference of opinion and vehement opposition from one side or another to proposals to repeal or amend it. Before the invention of cinematographs questions had arisen as to the effect of that

Act on Sunday concerts, and in *Williams* v. *Wright* (1) a Sunday concert at the Queen's Hall was brought before the Court on an allegation that it came within the Act. It was an action for a penalty by a common informer, which the Courts always require to be proved with the greatest strictness. The only evidence that the common informer offered to the Court was his ticket, which said: "Admission free, reserved seat 1s.," and on that the Court said: "How have you brought yourself within the Act? You prove that admission was free, that money was not charged for admission; go away and pay the costs." On that very slender foundation, a theory appears to have been built up, the details of which I do not venture to state, but the effect of which is that if a certain number of people get in free, it is supposed that the Act is avoided. Every case must turn on its own particular facts, and I only wish to say in passing that people who desire to evade or get round the Act must not assume that, if the question is tested in Court, the kind of device that they are at present pursuing will be found to free them from the penalties of the Act. If money is charged for admission to anybody on Sunday, it is very probable, and I say no more, that the Act is infringed.

A point appears to have been suggested before the County Council, although, of course, the experienced counsel who argued in this Court did not dream of putting forward so revolutionary a proposition, that if an Act is (I use the word reported to have been used by counsel before the Committee) "obsolescent," it may be disregarded. It was suggested in the argument before the Committee, to which I suppose they paid some attention, that the Act which empowered the Crown, if they thought right, to relieve persons who had broken the Act of penalties (2), repealed the Act. That, of course, is an absurd proposition, because the Act must be in force if there are any penalties from which to relieve the offender; and the doctrine that, because a certain number of people do not like an Act and because a good many people disobey it, the Act is therefore "obsolescent" and no one need pay any attention to it, is a very dangerous proposition to hold in any constitutional country. So long as an Act is on the statute book, the way to get rid of it is to repeal or alter it in Parliament, not for subordinate bodies, who are bound to obey the law, to take upon themselves to disobey an Act of Parliament.

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(1) (1897) 13 Times L. R. 551.

(2) The Remission of Penalties Act, 1875 (38 & 39 Vict. c. 80), is intituled: "An Act to amend the Act of the twenty-first year of the reign of King George the Third, chapter forty-nine, intituled: 'An Act for preventing certain abuses and profanations on the Lord's Day called Sunday,' and for further amending the law concerning the remission of penalties." Sect. 1 of the Act, after reciting that doubts were entertained as to the power of the Crown to remit penalties and forfeitures incurred under the

Now that was the position up to 1909, and a number of Sunday concerts were being held and prosecutions were not taking place, on the supposed authority of *Williams* v. *Wright* (1), where admission had been free for everybody. But the Cinematograph Act, 1909, imposed on all cinematograph theatres the necessity of obtaining a licence from the County Council or the Borough Council; the London County Council was the authority for the area of London, and consequently, every cinematograph theatre within that area had to apply to the London County Council for licences which the Council might, as they thought fit, grant "on such terms and conditions, and under such restrictions as, subject to regulations of the Secretary of State, the Council may by the respective licences determine"; and certain cases have been decided as to the conditions which the County Council may or may not impose. Speaking generally, though not in every case, the conditions imposed by the County Council have been upheld by the Courts. But this Act runs side by side with and does not repeal the Act of 1780, which provides that no place of entertainment shall be opened on Sunday

aforesaid Act of King George III., by reason of its being contended that the power of the Crown to remit such penalties and forfeitures does not extend to penalties and forfeitures recovered in penal actions, and that it was expedient to remove such doubts, enacted therefore as follows: "It shall be lawful for Her Majesty to remit in whole or in part any penalty, fine, or forfeiture imposed or recovered for any offence under the said Act, whether on indictment, information, or summary conviction, or by action, or any other process."

(1) 13 Times L. R. 551.

at a charge for admission. The London County Council, from a very early stage, appear to have inserted in their licence the condition, or restriction as they call it, "that the said premises be not opened on Sundays, Christmas Day or Good Friday for cinematograph entertainments." So far as that condition relates to Sundays, it is merely giving effect to the provisions of the Act of 1780, and calling the attention of the licensee to the fact that there is an Act which forbids him from opening his premises on Sundays if payment is charged for admission. Christmas Day and Good Friday stand in a different position. Christmas Day may of course fall on a Sunday sometimes, and if so, it is subject to the provisions of the Sunday Observance Act, 1780. On other days it will not be illegal to open on Christmas Day and to take payment for admission, and the County Council have adopted a form of licence which does require the licensee not to open on Christmas Day. Good Friday is in even a stronger position, for Good Friday cannot fall on a Sunday, and consequently, as far as Good Friday is concerned, this is again a new condition which derives its force only from the licence granted by the Council. But for a very considerable time the London County Council have adopted a system which, looked at in cold blood now, is very difficult to understand. They grant to the owner of a cinematograph theatre a licence on the terms that he shall not open on Sunday, and they then frame an elaborate series of rules providing for his applying for permission to open on Sundays, being a thing which he cannot do according to their licence and which is illegal according to the Act of 1780; but they make it a condition of anything being done in his favour under the application for permission to open on Sunday, that he shall pay money to a charitable institution; and when he has applied and is ready to pay that money, then they do not grant him in form the permission he asks for, but they say: "We will not at present prosecute, provided you pay money." There is a certain degree of humour in providing an elaborate system for applying for permission to open on Sunday, when they are never going to grant it. According to the view of

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the County Council, they are not granting, and never do grant, permission to open on Sunday; they simply say, "We will not at present prosecute you if you will pay money." They frame an elaborate series of rules regulating applications for permission to open on Sunday and other rules for those who would oppose applications for this permission, although, in the view of the County Council, the permission will never be granted. I cannot help thinking that when the County Council come to consider what they really have done, they will see that the view that they are taking of the position verges on the ridiculous. I ought perhaps to say that other county councils have not succeeded in persuading themselves to take this view.

The County Council put in evidence a letter from the Lord Chamberlain—because, of course, while cinematograph theatres are being dealt with in this way by the County Council, other places of entertainment, such as theatres, have to look to what the Lord Chamberlain will do. Being asked for his views on the subject, the Lord Chamberlain, on April 11, 1929, replied that as regards stage plays he could only administer the law as he found it—a remark that the County Council might bear in mind—and that it was not within his powers to sanction departure from the law without the consent, in the first place, of His Majesty's Government—I do not quite know what the Lord Chamberlain meant by that, because His Majesty's Government have no authority to dispense with laws—which, he continued, in its turn would be under the obligation of seeking the authority of Parliament. I believe I am right in saying that the same view is taken by the Middlesex and the Surrey County Councils, who do not grant permission to theatres to open on Sundays. One is rather tempted to inquire whether the Theatres Committee of the London County Council have ever heard of the Bill of Rights. (1) James II. lost his throne, and one of the causes of it was that he took upon himself to dispense with the operation of Acts of Parliament, without the consent of Parliament. In the case of Acts preventing Catholics from holding certain positions unless they carried out certain formalities, which their religion did not allow them to observe, James II. dispensed with the necessity of these persons obeying the Act of Parliament, whereupon, after the Revolution, one of the causes assigned for the Revolution was that he "did endeavour to subvert and extirpate the Protestant religion, and the laws and liberties of this Kingdom by assuming and exercising a power of dispensing with and suspending of laws, and the execution of laws, without consent of Parliament"; and Parliament, in passing the Bill of Rights, which used to be considered of equal authority with Magna Charta, provided that "the pretended power of suspending laws, or the execution of laws, by regal authority without the consent of Parliament, is illegal; that the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal." I take it that the London County Council is in no better position than James II. and that laws cannot be dispensed with by the authority of the London County Council, when they cannot by royal authority.

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(1) 1 Wm. & M. Sess. 2, c. 2.

Now in the present case, upon an application made some time in April, 1930, the proprietors of this cinematograph theatre, Streatham Properties, Ld., applied for and were granted a licence, which was issued on May 14, 1930, subject to the following restrictions: "That the said premises be not opened on Sundays, Christmas Day or Good Friday for cinematograph entertainments," and that was a perfectly legal licence and restriction. The licence is dated May 14, but before it was issued and received the proprietors of the theatre, under the rules that had been framed by the London County Council, sent in an application for permission to use the premises on Sundays. They had not at that time got the licence, but they probably knew the form in which the licence would be issued, and assumed that the procedure, which the County Council had been following for some time, of issuing a licence with a restriction, and then immediately attempting to nullify the restriction, would be followed; and so the proprietors, through Mr. Richardson, applied to the County

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Council " for permission to use the premises for cinematograph entertainments, on Sundays, Christmas Day and Good Friday "—being days prohibited by the licence granted for the premises under the Cinematograph Act, 1909. "It is proposed to pay to charities, list to be submitted later, the sum of 15*l*."—a purchase of exemption from the prohibition in the licence. Notice of his intention to apply, in order that opponents might appear, was duly given, and the case came on before a sitting of the Committee, conducted in praiseworthy imitation of the proceedings of the Courts—and I say that, because I was counsel in the first case that came before the Theatres Committee of the London County Council when they were started, and nobody would describe those proceedings as an imitation, praiseworthy or otherwise, of the proceedings in the Courts; but apparently the Theatres Committee has now modelled itself on the proceedings of the Courts. On this occasion there appeared counsel for the applicants for permission, which, according to the County Council's view, they were never going to get; there appeared counsel for an association representing the theatrical managers, who not unnaturally were rather annoyed that people competing with them should be able to open on Sunday while they were not, because the Lord Chamberlain observed the law; there appeared also a gentleman representing those who took strong views as to the necessity of maintaining Sunday as a day of rest. It is quite unnecessary to say that I am expressing no opinion whatever as to the desirability or non-desirability of maintaining the Act of 1780; that is a matter for Parliament. Counsel opened the case: " As you know this is an application for permission to open the Astoria Cinema, Streatham, on Sundays." He mentioned that there was a novel point taken, that the London County Council should not aid and abet the contravention of the Sunday Observance Act, 1780. This struck the Committee as quite a novel point. Counsel went on: " As to the Sunday Observance Act, 1780, this point is a mere technicality and is wholly fallacious when it is analysed "; and the analysis turned out to be that the Remission of Penalties Act, 1875, has necessarily repealed the Sunday Observance Act. The suggestion has been made by counsel here that the action of the County Council can be justified because the applicants might, by adopting the system of free seats, have not contravened the Sunday Observance Act. Unfortunately, when the facts are looked at, that excuse is not available to the London County Council, because they are told, before they come to their decision, that the applicants never admit people without payment, and propose to go on in the way in which they have hitherto conducted their hall. Witnesses having been heard and cross-examined, and counsel and persons addressing the Committee having been heard and thanked for their valuable contribution to the discussion, the Committee retire, and they come back and say: "The Committee have decided to raise no objection to the opening of the premises on Sundays and other prohibited days, subject to the payment to charity of an appropriate amount which will be notified to the licensee." We, having now seen the notification, observe that, whereas the licensee had offered 15*l.*, the Committee say: "No, 35*l.*"; they bargain with him as to the amount for which they will grant him permission to infringe an Act of Parliament.

I entirely agree with the view taken by the Divisional Court, that this is a granting, so far as the London County Council can grant, of permission to the applicants to open their premises on Sundays for public entertainment to which persons are admitted by the payment of money, and that such a proceeding is illegal, and especially illegal when the grantees are offered permission to break the law if they will pay a sum of money. It may be put in two ways: either the original licence stands prohibiting opening on Sundays, and (the original licence standing) the Committee of the London County Council are granting permission, so far as they are concerned, to break the conditions of the licence if money is paid; or it may be put in another way: our attention has been called, and the attention of the Divisional Court apparently was not called, to the London County Council (General Powers) Act, 1923, which in s. 16 says:

"In the case of any licence granted by the Council under the provisions of . . . . the Cinematograph Act, 1909 . . . . the Council at any time whilst the licence is in force may . . . . modify or waive any of the terms conditions or restrictions attached by the Council or attach new or substituted terms." The Council do not profess to have been altering the conditions in the licence; the original licence stands, and no new licence is issued with the substituted clause. If the matter had been done in that way and a new licence issued, it would have contained a provision inserted for the payment of money, which would violate an Act of Parliament. If the proceeding is not treated under that Act—and it was not so treated by the Committee—then the position simply stands that, a licence being granted prohibiting the licensee from opening on Sundays, for a payment of money the Committee are allowing the licensee to break the terms of his licence, with this result, amongst others: that the provision in the Cinematograph Act, s. 3, makes the person who breaks the conditions of his licence liable, on summary conviction, to a fine, and the licence, if any, shall be liable to be revoked by the County Council; and the County Council, for a payment of money, are preventing themselves from revoking the licence, because they have, in my view, given permission for the thing which is forbidden by the licence, and cannot revoke the licence after having granted permission to break the condition.

The facts which I have now stated in detail lead me to the conclusion that the Theatres Committee of the London County Council have been guilty of an illegal act in giving permission to the applicants to break the provisions of the Sunday Observance Act, 1780, and in doing this with their eyes open when the applicants tell them, "We propose to charge admission to the whole of this theatre."

A further question of some technicality was then raised by counsel for the London County Council, and as regards this I am not really sure for what purpose the County Council are raising it: whether it is to test the legality of the action of the Theatres Committee—an object which I can quite understand—or whether it is to ascertain whether the London County Council have discovered a way of getting round the Act which the Court cannot stop by certiorari—a much less dignified and public spirited position to take. An argument has been addressed to us, supported by a number of dicta in cases where the question was not raised, that this procedure of the Theatres Committee was not in any way a judicial act, but was an administrative act, and that if, in administration, they were doing a thing which they had no power to do, the writ of certiorari was not the proper means of questioning that action of theirs, though it was a usurped jurisdiction. Now in the early days of licensing there have been authorities bearing one way and the other, on the question whether the action of licensing justices is a judicial act, so that certiorari may lie, or is an administrative act, so that certiorari will not lie. The writ of certiorari is a very old and high prerogative writ drawn up for the purpose of enabling the Court of King's Bench to control the action of inferior Courts and to make it certain that they shall not exceed their jurisdiction; and therefore the writ of certiorari is intended to bring into the High Court the decision of the inferior tribunal, in order that the High Court may be certified whether the decision is within the jurisdiction of the inferior Court. There has been a great deal of discussion and a large number of cases extending the meaning of "Court." It is not necessary that it should be a Court in the sense in which this Court is a Court; it is enough if it is exercising, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition; and it is not necessary to be strictly a Court; if it is a tribunal which has to decide rights after hearing evidence and opposition, it is amenable to the writ of certiorari; and I do not discuss further the nature of the writ, because very elaborate discussions of it will be found in the recent cases of *Rex* v. *Electricity Commissioners* (1) and *Rex* v. *Minister of Health.* (2) As far as licensing is concerned, whatever doubts there were in the early stages of the proceedings—and there

(1) [1924] 1 K. B. 171.

(2) [1929] 1 K. B. 619.

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were many doubts—since the case of *Rex* v. *Woodhouse* (1) it is quite clear that every proceeding of magistrates or confirming authorities in granting new or renewing old licences is in the nature of a Court, excess of jurisdiction in which can be dealt with by the writ of certiorari; and the procedures in granting licences under the Cinematograph Act, and proceedings consequential thereon, appear to me to stand exactly on the same footing as the proceedings of magistrates or confirming authorities dealing with licences for public houses. When the question is, on what terms and conditions shall a licence be granted, and when the Committee proceeds to require that notice of the proposal shall be given, and to hear the applicant and his opponents, and to take evidence, the proceeding seems to me to be exactly that of a tribunal which the King's Bench Division, by the writ of certiorari, restrains within its jurisdiction. In my view the County Council, like any other body in this Kingdom, however important, must obey the law as laid down by Parliament, and until Parliament itself alters the law, neither the London County Council, nor any other body, has authority to dispense with the observance of a law on the statute book.

For these reasons, which I have elaborated out of respect to both the County Council and to the arguments which have been addressed to us by its advocates, I am of opinion that the decision of the Divisional Court was perfectly right, and that this appeal must be dismissed with costs.

Greer L.J. I am of the same opinion. On one question the facts of this case leave no room for doubt, that what the County Council did on May 29, 1930, upon the application then made to them with regard to the opening of the Streatham Astoria cinema on Sundays, was entirely illegal and was not binding upon anybody. The best that can be said on their behalf is, that all that they did was to make a bargain with the proprietors of that cinema that if the cinema was opened to the public as proposed on payment for admission they, the County Council, would not exercise

(1) [1906] 2 K. B. 501.

their rights or perform their duties with regard to the enforcement of the law, provided that a payment was made to some one or other of the charities that had the approval of the County Council. That bargain only requires to be stated for it to be as clear as anything can be that what the County Council did, even upon their own presentation of the case, was illegal.

The argument in this case was solely concerned with the question whether an application for a writ of certiorari was an appropriate way in which their conduct could be questioned. It is said that charity covers a multitude of sins, but I have never yet heard that cited to prove that if an act is done for charitable reasons, it is lawful, when it would otherwise be unlawful. During recent years there have been many occasions on which powers of legislation have been delegated to administrative bodies; but the power to legislate with regard to the opening of places of entertainment on Sundays has not yet been delegated to the London County Council; nor have they been given a power to impose upon those who do open on Sundays an additional entertainment tax for the benefit of the charities the Council desire to support, or some one or other of them; and that what they have done is illegal and contrary to law, there can be no room for doubt.

But it does not necessarily follow that they can be dealt with by writ of certiorari, and it is necessary shortly to examine what exactly it is they have done. Their powers with regard to licences for cinemas are given to them by the Cinematograph Act, 1909, and the subsequent London County Council (General Powers) Act, 1923. Under the 1909 Act they have power to grant licences, and they have power to impose conditions on the licences that they grant, and the Act provides for penalties for breach of those conditions: in the first instance, "a fine not exceeding twenty pounds, and in the case of a continuing offence . . . . a further penalty of five pounds for each day during which the offence continues, and the licence (if any) shall be liable to be revoked by the County Council." If the conditions imposed by a licence were broken, and the breach had come to their knowledge, it would be the duty of the County Council to consider and determine in the public interest whether they would revoke the licence or not. Under that Act, once they had granted the licence with certain conditions, it was a licence with those conditions for a year, and there were no provisions whereby during the year the conditions could be altered in any way. But by s. 16 of the Act of 1923, it is provided that: "In the case of any licence granted by the Council," including the cinematograph licences, "the Council at any time whilst the licence is in force may in their discretion on the application of the licensee modify or waive any of the terms conditions or restrictions attached by the Council or attach new or substituted terms conditions or restrictions to such licence and the terms conditions or restrictions as modified and any new or substituted terms conditions or restrictions attached under the powers of this section shall be as binding and enforceable in all respects as if they had been attached to the licence at the grant thereof." That section is the only section which gave them any power to entertain the application of the cinema proprietors which they heard on May 29 of last year, and it seems to me impossible for them to come into Court and say: "We were not exercising our powers under the Cinematograph Act and the Act of 1923; we were merely having a meeting in order that we might make up our minds whether we would or would not exercise the administrative function of prosecuting people who propose to break the law in the future." It seems to me quite clear that this Court must take it that the applications for which they made such elaborate provisions by their rules were applications under s. 16 to modify the conditions they had imposed by their licence.

Now the first condition imposed by the licence was that the theatre should not be opened on Sundays upon any terms. The effect of that was in some respects to modify the general law, as they could do by imposing conditions, making it an offence to open on Christmas Day or on Good Friday, or to open on Sundays unconditionally and without reference to the question whether the licensees received payment for admission to their building or not. The County Council were asked to modify that condition; and on the most favourable view of their action they did modify the condition, by adding to it the proviso that they would not enforce it so long as the sum of 35*l.* was "paid to charity in respect of each Sunday, Christmas Day and Good Friday on which the premises are opened for cinematograph entertainments," and provided "that a statement, certified by an independent auditor possessing professional qualifications, showing in detail receipts and expenses in connection with cinematograph entertainments held on Sundays, Christmas Day and Good Friday during the first six months such entertainments are held at the premises, be submitted to the Council in due course," and provided "that the conditions, Nos. 1 to 5 (inclusive), contained in the regulation of the Council relating to cinematograph entertainments held on Sundays, Christmas Day and Good Friday be strictly complied with." That is to say, they add to the condition No. 1 the proviso that, so long as the applicants did these things which are mentioned in the resolution of May 29, they might open on Sundays. That is an order which, if it had been made in the first instance, would have been made without any power at all, and would have made the whole licence bad, because it was exercising a dispensing power which was not given to the County Council by Parliament, and doing this for a payment, a condition which they were not entitled to impose. It seems to me that when that application was made for permission to open, whatever else they could do, they could not provide that it should be a condition of the opening that a payment should be made to a charity; and that alone would be sufficient to justify this Court in saying that the order, which took the form of a resolution so far as the words are concerned, made on May 29, was an order made without jurisdiction, that is to say, without the power to make it; and therefore it may be dealt with by this Court, provided there is no technical rule which prevents the Court exercising their powers, by ordering the writ of certiorari to be made absolute.

Now, if the illegal thing had been done when the original application for a licence was made, it seems to me plain on the authorities that it could be dealt with by certiorari. I cannot see any distinction between the application for a cinematograph licence and the application which is made to magistrates for a public house licence. With regard to the latter form of application, the law was stated by Vaughan Williams L.J. in the case, which my Lord has referred to, of *Rex* v. *Woodhouse* (1), in these terms: "I ask myself, therefore, the question whether the licensing justices in granting or refusing a licence do a judicial act. In my opinion the grant or refusal of such a licence is a judicial act." Those words apply equally to the question whether the County Council, in granting or refusing a licence for a cinematograph entertainment, were engaged in a judicial act; and if that is so as to the original grant, it equally applies to the application for any modification of the terms of that grant.

I have preferred to put my judgment on this ground, in the first place, but I agree with the view which has been expressed by Scrutton L.J., that the true interpretation of what took place between the applicants and the Committee on May 29 was that the applicants were applying for permission to open their cinema for payment by those who came in on Sundays, and that, whatever words were used, the real effect of what was said by the Committee in giving their decision was that the application was granted, and that they thereby made an order, disguised by the language which they used, for permission to open this cinema on Sundays for payment by those who presented themselves at the door for entry, and they were taking upon themselves to grant a permission that could be granted by no one in this country except Parliament. We have nothing to do with the question whether that which the County Council desired to achieve by what they did was or was not beneficial in the public interest. I can imagine that if we were a legislative body,

(1) [1906] 2 K. B. 501, 512.

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or if the County Council were a legislative body, so far as this subject is concerned, very strong arguments would be urged in support of the view that it would be an advantage and in the general interests of the public that every cinema should be allowed to open, at any rate on some part of Sunday; but the power to deal with a question of that kind does not rest with the Courts, and it does not rest, at any rate, for the present, with the County Council: it rests with Parliament, and must be determined by Parliament, and however ancient the Acts of Parliament may be which we are called upon to enforce, our sole duty is to see whether the case comes within the provisions of the Act which is cited to us.

I agree with my Lord that this appeal should be dismissed with costs.

SLESSER L.J. I agree that this appeal should be dismissed. It is a salutary rule before attempting to apply principles of law to a case, that an endeavour should be made to ascertain the facts. But when the facts of this case are considered, they are of such a confused nature, owing to the procedure which has here been employed, that it is almost impossible to say what the applicants desired to do and what the County Council intended to permit. In the first place an application was made for a licence under the Cinematograph Act, 1909, which is necessary in order that a cinematograph exhibition may lawfully be given. The applicants then made a further application on April 29 for permission to use the premises on Sundays, Christmas Day and Good Friday. When that application was made on April 29 the licence had not yet been granted; the licence was not granted until May 14; nevertheless the prohibition of performances on Sundays, Christmas Day and Good Friday, mentioned in the licence which had not yet come into existence, was sought to be removed by the application on April 29. That in itself shows an extraordinary confusion on the part of the applicants, and, I fear, of the County Council also. No doubt the explanation is that, having regard to the fact of the common form of licences which had been granted to other persons, and the persistence of this illegal practice, it was assumed by the applicants that, when the licence was granted, it would contain the conditions which they sought to remove; but the fact is that the licence had not been granted, and therefore the attempt to remove those conditions on April 29 was premature.

The second difficulty is this. It may be said that this was an application, not to dispense with conditions in the licence which had not yet come into existence, but to dispense with the statute: but that also leads to a confusion, because when the statute is examined, it is seen to apply only to Sundays, and not to Christmas Day or Good Friday, which are inserted in the application. So that it is impossible to say whether the applicants were asking the County Council for immunity for breaking the law expressed in a regulation which was not yet in existence, or immunity for breaking the law enacted in a statute which dealt only with some of the matters for which they were seeking dispensation. I have come to the conclusion, trying to make the best one can out of this confusion, that the applicants were seeking immunity from the provisions of both legal restrictions, and that in their view it did not very much matter to them whether they were exempted from the penalties of the Sunday Observance Act, or from the consequence of breaking the conditions imposed by the licence which had not yet come into existence. I notice, on examining the arguments which were addressed to the Committee authorized to hear this matter, which are exhibited in an affidavit, that the parties fluctuated between the two, speaking sometimes of the Sunday Observance Act, and sometimes of the regulations, which, by that time, on May 29, had come into existence.

Now in the proceeding before the County Council, of which we have heard nothing here, one of the arguments was that the Sunday Observance Act, 1780, was obsolete. The language of counsel on this point seems to have been accepted without much question by the County Council; I think therefore that I may be permitted here to repeat it. He says: "As to the Sunday Observance Act, 1780, this point is a mere technicality and is wholly fallacious when it is analysed. The Act of 1780 has been rendered obsolescent by the Remission of Penalties Act, 1875." On looking at the Remission of Penalties Act, 1875, so far from rendering the earlier Act obsolescent, if such a word can be applied to an unrepealed Act of Parliament (as to which I shall have to say more in a moment), we find that in 1875, which is a comparatively short time ago, the Legislature specifically passed an Act to amend the Sunday Observance Act, 1780, and said that in certain circumstances the Crown should have power to remit penalties imposed for offences under that Act. Why a power should be necessary to remit a penalty, when the Act which had imposed the penalty had become obsolescent, I do not know. It seems to me, in so far as any argument can be derived from the Act of 1875, that it is in favour of the contention that in 1875 the Legislature recognized the Sunday Observance Act, 1780, as having full force and effect, though it gave to the Crown certain powers to remit the penalties. There is this justification for the argument of counsel before the County Council, that the view that the Act of 1780 is spent has been accepted in the past by some Courts of summary jurisdiction. For example, some years ago there was an application concerning the National Theatre De Luxe in Bishopsgate, the proprietors of which were summoned by the Middlesex County Council for contravening the conditions of the licence granted for the exhibition of pictures under the Cinematograph Act. Counsel for the Middlesex County Council asked the Bench to inflict a penalty which would be a deterrent to the Sunday opening of picture palaces which was going on all over the country. "Sunday opening," he said—and these are the important words—"was allowable only on special permission granted by the . . . . Council under conditions as to the disposal of the receipts for charitable objects." The magistrates appear to have accepted that view. (1) His complaint was only that the conditions as to charitable objects had not been fulfilled. Now, seeing that such arguments have been addressed to magistrates, and seeing that this case does not turn on a mere technicality in the law, it seems necessary to declare, as my brothers have already said, that in the view of this Court the Sunday Observance Act, 1780, is still of full force and effect. There is indeed no such thing in this country as the expiration of a statute by becoming obsolete. In Scotland there is a condition known as an Act falling into desuetude, and it may well be that in England, owing to change or disappearance of the subject-matter of a statute, the statute has nothing left upon which to operate, and in that sense it may be said to be obsolete; but otherwise, as Dr. Lushington said in *The India* (No. 2) (1), an Act on every subject for which no time is limited is called a perpetual Act and continues in force until it is repealed. "No doubt exists that a British Act of Parliament does not become inoperative by mere non-user, however long the time may have been since it was known to have been actually put in force." Public entertainments are just as much in existence now as they were at the time of the passing of the Sunday Observance Act, 1780, and therefore the Act applies, and it is illegal to have public entertainments in the manner stated in that Act.

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(1) (1911) 75 J. P. 244.

I need not repeat what has been pointed out by my Lord, that the Council have no power either to remit the conditions of their own licence, except by a variation as provided in the Act of 1923, much less to suspend or dispense with the power given by Act of Parliament, and it is, I think, an unfortunate incident of this case, in days when some persons are inclined to treat the ordinances of the law lightly, that a large and responsible body like the London County Council should be so ill-advised as to think that it can, for whatever meritorious consideration, say that it will stay its hand and not take action in cases where its obvious public duty is to enforce the law. The duty of a body exercising a judicial power, to enforce the law, was pointed out in the case of *Reg.* v. *Boteler.* (2) There the justices refused to issue a warrant, adding that they did so in the exercise of their discretion on the ground that they

(1) (1864) 33 L. J. (P. M. & A.) 193.

(2) (1864) 4 B. & S. 959.

thought that the Act of Parliament was unfair. Cockburn C.J. said (1): "I do not intend in the slightest degree to encroach upon the doctrine that, where magistrates have a discretionary power to decide whether they will do an act or not, this Court will not order them to do it when they have exercised their discretion upon the merits of the matter. But it is clear, upon the facts of the present case, that they have not exercised that discretion which in law they would have been justified in exercising. This extra-parochial place, having been made part of a Union, became liable by law to contribute its share to the general expenses of the Union; and the magistrates, having that fact established before them, ought to have issued their warrant. It is equally clear that the reason why they did not do so was because they were invited to exercise their discretion on a matter which was not within it. They proceeded upon the ground that the annexation of this extra-parochial place to the Union was unjust, in other words, that the operation of the Act of Parliament under which that was effected was unjust. Their decision virtually amounts to this—'We know that upon all other grounds we ought to issue our warrant, but we will take upon ourselves to say that the law is unjust, and therefore we will not issue it.' That is not a tenable ground on which this Court can allow magistrates to decline to exercise their discretion according to law."

There remains only the question whether here the remedy which has been sought by the respondents is or is not an appropriate remedy, that is, the remedy of certiorari. Atkin L.J. (as he then was) in *Rex* v. *Electricity Commissioners* (2), lays down four conditions under which a rule for a certiorari may issue. He says: "Wherever any body of persons" (first) "having legal authority" (secondly) "to determine questions affecting the rights of subjects, and" (thirdly) "having the duty to act judicially," (fourthly) "act in excess of their legal authority"—the subdivisions are my own—"they are subject to the controlling jurisdiction of the King's Bench Division exercised in these

(1) 4 B. & S. 964. (2) [1924] 1 K. B. 171, 205.

writs." Applying that test to the present case, what do we find? First, have the County Council legal authority to determine questions affecting the rights of subjects? I think it is clear, when the Cinematograph Act, 1909, is considered, that the question which they had to decide—namely, whether they would or would not grant a licence—is a question affecting the rights of subjects. Sect. 2 of that Act imposes upon the County Council an obligation to notify the police; an application for a licence must be sent to the Chief Officer of Police of the police area in which the premises are situated. That is one indication that the granting or refusal of the licence was one which affects the subject. Another is that the regulations under which the licence may be granted by a County Council are subject to regulations of the Secretary of State, an officer of the Crown. Indeed it can scarcely be argued seriously that the granting of a licence for a cinematograph exhibition, both on the ground of safety, and on the ground of morality, is not one which affects the public and the rights of subjects. Moreover a monopoly is conferred upon persons who have these performances which is denied to other persons. Then, secondly, having that legal authority, do they determine questions affecting the rights of subjects? The legal authority is clearly given by the section to grant the licences, and I have pointed out how it affects the rights of the subject. But the third question is the one which was most strenuously debated in the argument before us: Are the Council under a duty to act judicially? It is said that what has here been done is not a judicial act, or not an act of an administrative body having judicial duties to perform, but is in substance an administrative act for the review of which the writ of certiorari is not appropriate. I am unable to distinguish in principle between the application for a licence under the Cinematograph Act, 1909, and an application made with regard to a licence for a public house, which for many years, as to the Confirming Authority, and later, as to the whole proceedings, has been held to be a judicial act. It was suggested, so far as I understood the argument which attempts to differentiate this application from an application for a public house licence, that there is not provided in terms in s. 2 any provision for opposition; and that is perfectly true. There is an obligation to notify the police, but there is not in terms there any provision for dealing with opposition, though the County Council have made an elaborate code under which opposition may be heard. I have examined other statutes which similarly contain powers to grant licences, but do not in terms mention opposition, and I find that in one, at any rate, the action of the magistrates was treated as a judicial act, although the statute contained no express provision for opposition. I refer to the Alehouse Act, 1828 (9 Geo. 4, c. 61): an Act to regulate the granting of licences to keepers of alehouses; by s. 10 of which it was provided that notice of application for a licence should be affixed to the door of the Church or Chapel of the parish in which such house was situate, and also that notice shall be given to the magistrates in the form provided in the schedule; but there is not in that section, nor in any section of that Act, any specific provision that objection as such will be heard. Nevertheless, in the case of *Reg.* v. *Justices of Walsall* (1): "Where due notice under 9 Geo. 4, c. 61, had been given to justices of an intention to apply for a licence to sell excisable liquors, and the justices had refused to hear such application" on the general principle that they thought there were enough alehouses in the district, and would not hear the case on the merits, the Court awarded a peremptory mandamus, on the ground that: "The statute appoints the justices to act as judges, and not as tyrants. They have determined without hearing, and the application must therefore be granted." That is an authority that where, on the face of it, it appears that a licence is to be granted to certain persons and not to others, conferring upon them certain rights and obligations, the mere fact that a statute does not in terms provide for opposition to be heard, does not any the less make the duty of the magistrates a judicial duty; and therefore it is clear that they were acting or purporting to act judicially in hearing

(1) (1854) 3 W. R. 69.

this application, assuming that it was an application to modify the licence. Of course, as was pointed out by Greer L.J. in the course of the argument, unless the body was usurping a jurisdiction or acting contrary to their juridical powers, it would not be necessary to have a certiorari at all; and to argue that, because they have gone beyond their powers, therefore certiorari would not lie, would be to defeat the whole purpose of the writ. But the question is, have they purported under the statute, and have they a duty under the statute, to perform a judicial function in hearing applications for these licences? In my opinion they certainly have.

Then I come to the fourth condition laid down by Atkin L.J., and ask: Have they acted in excess of their legal authority? What they have done is to say that on this application no action shall be taken for the present. In my opinion that is to say that they will allow, subject to the conditions which they have mentioned, a breach of their own regulations and a breach of the Act of Parliament, and (what is perhaps even more important from one point of view) they bind themselves in advance "for the present," whatever that may mean, not to exercise the power vested in them by s. 3 of the Cinematograph Act, 1909—namely, to revoke the licence if the conditions and restrictions of the licence are not observed. In so doing they have fettered their judicial discretion in the matter of the revocation, and, as *Reg.* v. *Boteler* (1) points out, by refusing to prosecute they have acted beyond their discretion, and though the way in which they have done it is unlawful, irregular and illogical, yet nevertheless, as it is done, it is a fit subject for being quashed.

I would only add this in conclusion. In my opinion the fact that they have laid down conditions as to charities and the like, the fact that those conditions may or may not be of benefit to the public, and the fact that their motives may have been excellent, do not, in my opinion, make the slightest difference in the determination of this case. I should have come to precisely the same conclusion if they had laid down

(1) 4 B. & S. 959.

no conditions at all, or if the conditions which they had laid down were even more meritorious, if conditions can be more meritorious, than those which they have laid down. Speaking for myself, although it is the fact that money was to be given to certain charities, and even if money payments were made to the authority granting the dispensation, as in *Attorney-General* v. *Wilts United Dairies* (1), such matters do not influence the decision of this case. The fact is that the Council have not acted judicially, because they have sought to give permission in effect to break the conditions of an Act of Parliament, to break their own regulations without varying those regulations, and to fetter their own discretion in deciding whether a licence is liable to revocation for breach of those conditions, all of which are beyond their power; and I agree entirely with Mr. Montgomery, that the question is whether the appellants were purporting to act under a statute which imposed upon them a duty to act judicially. In my opinion they had a duty to act judicially. They did not act judicially, but that fact does not make their order any the less subject to the jurisdiction of the Court.

For these reasons I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitor for appellants: *S. A. R. Preston-Hillary.*
Solicitor for respondents: *Philip J. Rutland.*

(1) [1922] W. N. 217; 91 L. J. (K. B.) 897.

W. H. G.

1931
March 27, 30.

HALIFAX BUILDING SOCIETY AND ANOTHER *v.* KEIGHLEY AND ANOTHER.

[1931. H. 692.]

Mortgage—Fire Insurance—Insurance by Mortgagor apart from Statute and Mortgage Deed—Fire—Payment of Insurance Money to Mortgagor—Right of Mortgagee to Money paid to Mortgagor—Subrogation—Statute—Repeal—Extent of—Conveyancing Act, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 23, *sub-ss.* 3, 4—*Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 108, *sub-ss.* 3, 4; *s.* 207.

A mortgage deed made in 1919 provided that the mortgagees might insure the premises against fire, and that the mortgagors should pay the premiums to them. Before 1925 the mortgagees effected insurances of the premises under the deed. Before that year the mortgagors also effected with other insurers an insurance of the premises apart from statute or the deed in their own names. In 1930, while the deed and insurances were all in force, the premises were damaged by fire. The respective insurers paid to the mortgagors and mortgagees the proportions of the loss for which they were responsible. The mortgagees brought an action against the mortgagors for payment over of the money paid to the latter by their insurers:—

Held, that the plaintiffs were not entitled to succeed in the action, either (1.) under s. 23, sub-s. 4, of the Conveyancing Act, 1881, inasmuch as that sub-section had been repealed by s. 207 of the Law of Property Act, 1925, subject to a proviso that the repeal should not affect any right acquired before the latter Act, and no right to the money which the plaintiffs claimed had accrued to them before that Act; or (2.) under s. 108, sub-s. 4, of the Law of Property Act, 1925, inasmuch as the insurance effected by the defendants was not an insurance effected under that Act or any enactment replaced thereby, or an insurance for the maintenance of which the defendants were liable under the mortgage deed; or (3.) on the footing that the defendants were trustees of the money for the plaintiffs, or otherwise liable to them therefor.

Lees v. *Whiteley* (1866) L. R. 2 Eq. 143 and *Sinnott* v. *Bowden* [1912] 2 Ch. 414 followed.

Sect. 23, sub-s. 4, of the Conveyancing Act, 1881, in so far as it may remain unrepealed by the Law of Property Act, 1925, is not subject to the limitation which restricts sub-s. 3 of that section to money received on an insurance effected under the mortgage deed or under the Act; but is subject to the limitation that it applies only to money received on an insurance in which the mortgagor and the mortgagee are one or other or both interested.

In re Doherty (*J. E.*) [1925] 2 I. R. 246 approved.

ACTION on a specially indorsed writ tried by Wright J. as a short cause under Order XIV., r. 8.

The facts of the case are set out in the earlier part of the judgment of the learned judge, which was as follows:—

The plaintiffs are the successors in title of the Halifax Permanent Benefit Building Society, and that society on April 30, 1919, granted a mortgage to the defendants Gilbert and Frank Keighley, in respect of certain premises, the property of the defendants. The sum covered by the mortgage was 3360*l.*, and was increased by a further charge with which I may not deal. It was a term of the deed that "it shall be lawful for the society from time to time to effect in the name of the society such insurances against fire in respect of any buildings for the time being on the said hereditaments as the directors may from time to time deem necessary." There was a further provision that the mortgagors "will at all times during the continuance of this security duly and punctually pay to the society all premiums and moneys necessary for keeping up any insurance against fire in respect of the buildings for the time being on the said hereditaments which shall have been effected by the society in exercise of the power in that behalf hereinbefore contained when the same shall become due or within one week thereafter." There were also certain rules of the society, rules from 93 to 96 inclusive, made binding by the covenants in the agreement, but in my judgment nothing turns on those rules. There were two insurances with the Alliance Assurance Company, Ld., effected on the property by the society, the plaintiffs, but entered in the joint names of the society as mortgagee and the mortgagors. One was dated May 14, 1920, and the other was dated November 20, 1924. Each of these policies contained, though not in identical terms, a familiar clause. I take, as representative of the clause, condition 8 in one of them, which reads: "If at the time of any destruction of or damage to any property hereby insured there be any other insurance effected by or on behalf of the insured covering any of the property destroyed or damaged, the liability of the company hereunder shall be limited to its rateable proportion of such destruction or damage." That clause is now almost, if not quite, universal in fire policies. The mortgagors, however, the defendants, also effected a separate policy in their own name with the Car and General Insurance Corporation, Ld. That policy covered other property as well as the property which was the subject of the mortgage. In November, 1930, while the mortgage deed and these three policies were all current, a fire took place on the defendants' premises and very considerable damage was done, though the whole property was not destroyed. In consequence, a claim was put forward by the plaintiffs, though no doubt the defendants must have joined with them, as the policies were joint policies, for the loss and damage. The claim on that basis was for 2965*l.* But for the fact of there being the third policy taken out by the mortgagors with the Car and General Insurance Corporation, Ld., the Alliance Assurance Company, Ld., would have duly paid that sum of 2965*l.*, and that would have been received by the plaintiffs and would have been appropriated by them to the reduction of the debt. By reason, however, of the fact of the third policy taken out by the mortgagors and the presence in the Alliance policies of the clause such as I have read, the Alliance Assurance Company, Ld., were entitled to reduce the amount which they paid to the building society by a sum of 525*l.* 14*s.* 7*d.*, and they did so reduce it. It is common ground that that reduction was properly made and that the amount recoverable on the Alliance policies was limited to 2439*l.* 5*s.* 5*d.*

The plaintiffs brought the present action against the defendants in the King's Bench Division of the High Court on a specially indorsed writ to recover the above mentioned sum of 525*l.* 14*s.* 7*d.*, which the Car and General Insurance Corporation, Ld., had paid to the defendants. In the statement of claim indorsed upon the writ the only claim originally made was under s. 108, sub-s. 4, of the Law of Property Act, 1925 (1); but, on the application of counsel for the plaintiffs, Wright J. allowed the statement of claim to be amended so as to include an alternative claim under s. 23, sub-s. 4, of the Conveyancing Act, 1881 (1), and a further alternative claim against the defendants as trustees for the plaintiffs of the sum claimed.

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(1) The material statutory provisions are set out below in the judgment of the learned judge.

A. J. Belsham for the plaintiffs.

Gilbert Beyfus for the defendants.

[The arguments of counsel fully appear from the judgment of his Lordship. In addition to the authorities there mentioned, certain observations of Mellish L.J. in *North British and Mercantile Insurance Co.* v. *London, Liverpool, and Globe Insurance Co.* (1) were relied upon on behalf of the plaintiffs.]

March 30. WRIGHT J. This case is tried as a short cause on a specially indorsed writ. [His Lordship stated the facts as above set out and continued as follows:] The claim in the action is by the plaintiffs to recover from the defendants the sum of 525*l.* 14*s.* 7*d.*, which they have received from their insurance company in those circumstances, that being the amount attributable to the property covered by the mortgage. The claim as indorsed on the writ was originally limited to a claim pursuant to s. 108, sub-s. 4, of the Law of Property Act, 1925, but on the application of Mr. Belsham I have allowed the claim to be amended by putting in an alternative claim under s. 23, sub-s. 4, of the Conveyancing Act, 1881, and also a further alternative claim on the ground that the defendants are trustees or accounting parties to the plaintiffs in respect of this same amount. I must deal with each of those three alternatives.

So far as the claim on s. 23, sub-s. 4, of the Conveyancing Act, 1881, is concerned, I think that, if that section now applies, the plaintiffs are right in their claim. The section is in these terms: "without prejudice to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under his mortgage." Mr. Beyfus has contended that those words, which are general in their terms and must be subject to some limitation, have to be read as subject to the same limitation by way of implication, as is expressed in the preceding sub-s. 3. The limitation is there expressed as "All money received on an insurance effected under the mortgage deed or under this Act." He points out quite truly that the defendants' insurance with the Car and General Insurance Corporation, Ld., is neither effected under the mortgage deed nor under the Act. But I do not think any such limitation can be read into sub-s. 4. That section may be limited, and I think ought to be limited, to insurances in which the parties are one or the other or both interested, and therefore will cover an insurance effected by the mortgagor, and if these words apply will cover the defendants' insurance in this case. I have been referred to an authority to the same effect, an authority which does not bind me, but which I should treat with respect, which in fact agrees with the view I have independently formed. That is the Irish case of *In re J. E. Doherty.* (1) But before giving effect to any such view in the present case it is necessary to consider the further submission made by Mr. Beyfus, that this sub-section no longer applies, because it has been repealed by the repealing section, s. 207 of the Law of Property Act, 1925. That section repeals the Acts mentioned in the Seventh Schedule to the Act, which includes the Conveyancing Act, 1881, and therefore the sub-section to which I have been referred is prima facie repealed unless it falls within the qualifying sub-section of s. 207. Sect. 207 (*a*) is in these terms: "Nothing in this repeal shall affect the validity or legality of any dealing in property or other transaction completed before the commencement of this Act, or any title or right acquired or appointment made before such commencement, but, subject as aforesaid, this Act shall, except where otherwise expressly provided, apply to and in respect of instruments whether made or coming into operation before or after such commencement." The instruments in question here are the mortgage deed, the further charge and the insurance policies, and they are all anterior in date to the commencement of the Law of Property Act, 1925, and the operative words apply to instruments made and coming into operation before such commencement and therefore apply to these instruments. It is, however, contended that what is in question here comes within the words, "title or right acquired or appointment made before such commencement." What is in question here is the plaintiffs' right to require payment to them of certain moneys which have accrued due under an insurance policy, and in my judgment it is the date at which that right accrues which must be the governing factor in this case. Assuming there was a right under the sub-section of the Act of 1881 it can only arise when the necessary conditions have been fulfilled; first of all, that there should be money received on the insurance, and secondly, that requirements should be made by the mortgagees that that money should be paid over to them. These conditions in the present case were clearly not fulfilled before the commencement of the Law of Property Act, 1925. I further think that the words in question, "title or right acquired or appointment made," are not precisely apt to the facts of this case. More apt words are to be found in another enactment referred to in s. 207—namely, the Interpretation Act, 1889, s. 38, sub-s. 2 (*c*), which refers to "any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed," and that is saved by the proviso to s. 207, which provides that its terms are without prejudice to the provisions of this section of the Interpretation Act, 1889. In my judgment the claim under s. 23, sub-s. 4, of the Conveyancing Act, 1881, fails, because that sub-section was not applicable in this case at any material time.

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(1) (1877) 5 Ch. D. 569, 583.

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(1) [1925] 2 I. R. 246.

The statutory rights of the parties, if any, must therefore depend upon s. 108, sub-s. 4, of the Law of Property Act, 1925. That sub-section is in these terms: "Without prejudice to any obligation to the contrary imposed by law,

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Wright J.

or by special contract, a mortgagee may require that all money received on an insurance of mortgaged property against loss or damage by fire or otherwise effected under this Act, or any enactment replaced by this Act, or on an insurance for the maintenance of which the mortgagor is liable under the mortgage deed, be applied in or towards the discharge of the mortgage money." That sub-section follows sub-s. 3, which is in substance identical with the language of sub-s. 3 of s. 23 of the Conveyancing Act, 1881. Whereas sub-s. 3 gives the mortgagee a right to have moneys applied to reinstatement, sub-s. 4 entitles the mortgagee to have insurance moneys received by the mortgagor under an insurance as defined applied to a discharge of the mortgage money. It is clear that that sub-section is deliberately worded in order to limit the scope of its application. It applies according to its express terms to an insurance effected under the Act or any enactment replaced by the Act, that is in effect an insurance effected under s. 101 subject to the qualifying conditions of s. 108, sub-ss. 1 and 2. It is clear that the insurance here in question, that is the insurance effected by the defendants as mortgagors with the Car and General Insurance Corporation, Ld., cannot come within those terms, and it is I think equally clear that this insurance cannot come within the other term in the sub-section—namely, "an insurance for the maintenance of which the mortgagor is liable under the mortgage deed." This is an insurance which is in no way dealt with by and which in no way comes within the scope of the mortgage deed, but is outside it altogether. In my judgment accordingly the claim of the plaintiffs under s. 108, sub-s. 4, of the Law of Property Act, 1925, must fail.

There remains the third alternative claim as put forward by Mr. Belsham for the plaintiffs. There again it seems to me that the plaintiffs must fail. The claim cannot be put and is not put as damages for breach of any covenant in the mortgage deed. There is no covenant at all in the mortgage deed which refers to any outside insurance effected by the mortgagor at his own expense, and there is no covenant in the mortgage deed or in the rules which makes it a breach of covenant on his part to effect any such insurance, even if it affects recovery on the other policies. But even if there was it would be beyond the scope of this action, which does not deal with damages, but only with liquidated claims. In so far as it is sought to say that the defendants are in some way constructively constituted trustees of this money for the plaintiffs it seems to me that any such contention is contrary both to principle and authority. It was held in the case of *Lees* v. *Whiteley* (1) that the plaintiff, an assignee under a bill of sale of certain chattels, had no claim to the benefit of a policy against fire effected by the mortgagor. The deed contained a covenant to insure, but no provision for the application of the policy moneys in case of fire. The plaintiff was claiming there that he was entitled to have the money received by the mortgagor applied to the reduction or liquidation of the mortgage debt. Kindersley V.-C. said it was an assignment by bill of sale of machinery containing a covenant to insure, and that there were no terms as to the benefit of the policy passing by the assignment, and the learned Vice-Chancellor proceeds in this way: "If the plaintiff's contention can be sustained, it must stand on the footing that by reason of the covenant to insure there is an implied contract with the mortgagee that the policy moneys should be applied in liquidation of the mortgage debt. The question then comes to this: Can I imply such a covenant from the language of the bill of sale? and on examination of the terms of that instrument I am of opinion that I cannot. Were I to do so I should be making a new contract between the parties. It was perfectly competent to the plaintiff to have stipulated that the policy moneys should be applied in liquidation of the mortgage debt or in the restoration of the premises, but he has not done so; and how can I say that the parties intended something which is not stipulated for in this instrument, or make for the plaintiff a better agreement than he thought it necessary to make for himself? It might be that if he had insisted on such a contract, Messrs. Whiteley would have refused it. In point of fact, the existence of the insurance is obviously to some extent for the benefit of the mortgagee, although there was no obligation on the mortgagor to apply the insurance moneys in any particular way; because it is for the interest of the mortgagee that his mortgagors should be in a solvent condition." (1) That decision was expressly approved by Parker J. (as he then was) in *Sinnott* v. *Bowden.* (2) He there says: "It is, I think, clear that, apart from special contract or the provisions of some statute, a mortgagee has no interest in the moneys payable under a policy of insurance effected by a mortgagor on the mortgaged premises" (3), and then the learned judge refers to *Lees* v. *Whiteley* (4); *Poole* v. *Adams* (5); and *Rayner* v. *Preston.* (6) That being the law, it seems to me that the plaintiffs' third ground of claim must fail equally with the others. The decision of *Lees* v. *Whiteley* (4) was in 1866, at which time I apprehend there was no statutory provision analogous to that which was afterwards found in s. 23, sub-s. 4, of the Conveyancing Act, 1881. The mortgage in question here was no doubt prepared by a draftsman, who had in mind the provisions of that subsection of the Act of 1881, and no doubt since the Act of 1925 those who prepare similar documents adapt them to the provisions of the Act of 1925, but in the present case there is no special covenant and no statutory provision which applies.

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(1) (1866) L. R. 2 Eq. 143.

In the result in my judgment the plaintiffs have not the right for which they are here contending, and their claim must be dismissed with costs.

Judgment for defendants.

Solicitor for plaintiffs: *F. B. Brook, for Gaunt, Foster & Co., Bradford.*

Solicitors for defendants: *Somerville, Philpot & Co., for F. G. & H. E. Smith; Bradford.*

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(1) L. R. 2 Eq. 149.
(2) [1912] 2 Ch. 414.
(3) Ibid. 419.
(4) L. R. 2 Eq. 143.
(5) (1864) 12 W. R. 683.
(6) (1881) 18 Ch. D. 1.

J. R.

FORDREE *v.* BARRELL.

C. A.
1931
April 14,
15, 24.

Landlord and Tenant—Rent Restriction—Recovery of Possession—Dwelling-house—Effect of Sub-letting of furnished Rooms—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12.

The tenant of a dwelling-house which was within the rental limits of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, sub-let furnished certain rooms of the house to two persons, reserving for herself merely one room and the scullery. The sub-tenants were given by the tenant the right, as against herself, to exclusive possession of the rooms in question. On becoming aware of the sub-letting the landlord of the house gave notice to terminate the tenancy, and thereafter took proceedings to recover possession of (*a*) the whole house or (*b*) the rooms which had been sub-let:—

Held, that the rooms which had been sub-let had become decontrolled by virtue of s. 12, sub-s. 2, of the Act of 1920, and therefore that the landlord was entitled to recover possession of those rooms.

Spurling v. *Pugh* (1926) Estates Gazette, June 12, 1926, approved and followed. Observations by Salter J. in *Ebner* v. *Lascelles* [1928] 2 K. B. 486, 490 not followed.

Appeal from a decision of the Divisional Court.

The defendant, who had been for some time a tenant of the plaintiff of the whole of a dwelling-house, consisting of six rooms and scullery, No. 6 Ratcliffe Road, Forest Gate, at a rent of 14*s.* 4*d.* a week, sub-let two of the rooms, fully furnished, at a rent of 20*s.* a week, and sub-let three rooms, partly furnished, at a rent of 22*s.* a week, in each case so as to give the sub-tenants rights against herself to exclusive possession. She reserved for herself one room, in which she lived, and the scullery. The plaintiff, on becoming aware of this sub-letting, gave notice to terminate the defendant's tenancy of the whole house. That notice expired on May 5, 1930, and thereafter he issued a county court plaint to recover possession of (*a*) the whole house, or (*b*) the parts which had been sub-let. The county court judge decided against the plaintiff's claim, but on appeal the Divisional Court (Lord Hanworth M.R. and Romer L.J., sitting as additional judges of the King's Bench Division), following the decision in *Spurling* v. *Pugh* (1), reversed the decision of the county court judge, and directed judgment to be entered in favour of the plaintiff for possession of the rooms which had been sub-let, inasmuch as they had been taken out of the protection of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, by s. 12, sub-s. 2, of that Act. (1)

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(1) Estates Gazette, June 12, 1926.

The defendant appealed.

Safford (*Sir George Jones* with him) for the appellant. First, although by s. 12, sub-s. 2, of the Act of 1920 a part of a house "shall be deemed to be a dwelling-house to which this Act applies," it is nowhere stated that a part of a house shall be deemed to be a dwelling-house to which the Act does not apply. A part of a house, in the absence of specific definition, is not a "dwelling-house." Therefore as proviso (i.) to sub-s. 2 refers in terms only to a dwelling-house and defines a category to which the Act does not apply, there is not sufficient justification for holding that a part of a house is a dwelling-house within the proviso. The decision in *Spurling* v. *Pugh* (2), which was followed by the Divisional Court in this case, is not binding upon this Court, and should not be followed. Moreover, it is inconsistent with the later view expressed by Salter J. in *Ebner* v. *Lascelles*. (3)

Secondly, by proviso (ii.) to s. 12, sub-s. 2, "the application of this Act to any house or part of a house shall not be excluded by reason only that part of the premises is used . . . . for business . . . . purposes" clearly applies to the facts of this case, the parts of the house sub-let furnished by the appellant being used by her for her business of letting lodgings.

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(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 2: "This Act shall apply to a house or part of a house let as a separate dwelling, where either the annual amount of the standard rent or the rateable value does not exceed —(*a*) in the metropolitan police district . . . . one hundred and five pounds . . . . and every such house or part of a house shall be deemed to be a dwelling-house to which this Act applies: Provided that—(1.) this Act shall not, save as otherwise expressly provided, apply to a dwelling-house bona fide let at a rent which includes payments in respect of board, attendance, or use of furniture; and (2.) the application of this Act to any house or part of a house shall not be excluded by reason only that part of the premises is used . . . . for business, trade or professional purposes . . . .'

(2) Estates Gazette, June 12, 1926.

(3) [1928] 2 K. B. 486, 499.

Thirdly, even if the foregoing submissions are wrong and the parts of the house sub-let furnished are decontrolled, the Court cannot make an order for possession of part of premises which are the subject of a single letting. Sect. 138 of the County Courts Act, 1888, which is the section under which these proceedings are brought, contemplates only an order for possession of the whole subject of the letting. This is so, because at common law a notice to quit in respect of part of premises is invalid. This argument it is admitted is inconsistent with the form of order in *Gidden* v. *Mills* (1), but is not inconsistent with the result in that case, because the tenant there had sub-let the whole of the dwelling-house part of the premises, and an order could therefore have been made for possession of the whole: see *Haskins* v. *Lewis*. (2)

[He also referred to *Chiverton* v. *Ede* (3) and *Leslie & Co.* v. *Cumming*. (4)]

Grattan-Bellew (*A. T. Denning* with him) for the respondent. There is no legal objection to a landlord recovering possession of part of a dwelling-house: *Salter* v. *Lask* (5); see also *Gidden* v. *Mills* (1) and *Thompson* v. *Rolls*. (6) The parts of the dwelling-house which were sub-let by the appellant were taken out of the protection of the Act by s. 12, sub-s. 2, as was clearly decided in *Spurling* v. *Pugh* (7), which should be followed. That case was not cited to the Court which decided *Ebner* v. *Lascelles*. (8)

Safford replied.

Cur. adv. vult.

April 24. The following judgments were read:—

SCRUTTON L.J. This appeal like many others on a few facts raises puzzling questions under the Rent Restrictions Acts as between landlord and tenant.

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(1) [1925] 2 K. B. 713.
(2) [1931] 2 K. B. 1.
(3) [1921] 2 K. B. 30.
(4) [1926] 2 K. B. 417.
(5) [1924] 1 K. B. 754.
(6) [1926] 2 K. B. 426, 437.
(7) Estates Gazette, June 12, 1926.
(8) [1928] 2 K. B. 486.

The landlord let a house containing six rooms and a scullery to the tenant at a rent of 14*s*. 4*d*. a week. The tenant then sub-let to one tenant two rooms on the ground floor fully furnished at a rent of 20*s*. a week, and sub-let to another tenant three rooms on the top floor partly furnished at a rent of 22*s*. a week. The tenant reserved for herself one room and a scullery, in which she lived. The landlord, discovering this, gave notice to the tenant to terminate the common law tenancy, which then expired on May 5, 1930, and on May 9, 1930, issued a county court plaint claiming to get rid of the statutory tenancy under the Rent Restrictions Acts, either as to the whole house, or as to the parts sub-let furnished. The county court judge held that "the proceedings were entirely misconceived from a commonsense point of view," a perilous way to approach the very artificial provisions of the Rent Restrictions Acts. He apparently took the view that no transactions between the tenant and sub-tenant could affect the legal position between the landlord and tenant. This view in my opinion is quite inconsistent with some of the provisions in the Acts, as for instance s. 5, sub-s. 1 (*h*), of the Act of 1920, as amended by s. 4 of the Act of 1923.

On appeal to a Divisional Court, composed of the Master of the Rolls and Romer L.J., sitting as a Divisional Court of the King's Bench Division, and therefore treating themselves as bound by other decisions of Divisional Courts, the Court allowed the appeal. They gave the landlord possession of the five rooms let by the tenant as furnished rooms; they allowed the tenant to remain in possession of the room and scullery she occupied herself, and they ordered the county court judge to apportion the rent of the house so as to fix the statutory rent of the two rooms occupied by the tenant. Both judges treated themselves as bound by a decision of Salter and Fraser JJ. in *Spurling* v. *Pugh* (1), given on June 8, 1926. Romer L.J. said that but for that case he would have desired to take further time for consideration. Lord Hanworth M.R. took the view that on the merits *Spurling* v. *Pugh* (1) was rightly decided. Leave to appeal was given. The attention of the Court was not called to the fact that in *Ebner* v. *Lascelles* (1) Salter J. is reported as having expressed an opinion on the relevant point directly contrary to his opinion as reported in *Spurling* v. *Pugh*. (2)

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(1) Estates Gazette, June 12, 1926.

The case was fully argued before us, and a number of cases were cited, as to which both counsel agreed they could hardly all be correct. Sect. 12, sub-s. 2, of the Act of 1920 provides that the Act is to apply to a house "or part of a house let as a separate dwelling," whose standard rent or rateable value does not exceed a specified sum. The sub-section goes on rather tautologically to provide that "every such house or part of a house shall be deemed to be a dwelling-house to which this Act applies." The effect of this seems to be that in a dwelling-house (the whole house structurally) you may have two or more "dwelling-houses" let as separate dwellings. The tenant of the whole house may create against himself several dwelling-houses by sub-letting parts of the whole house, so as to give his sub-tenants rights against himself to exclusive possession. I mention this to exclude the question of lodgers, who could not exclude their immediate landlord. This case was argued throughout on the basis that apart from the question of furniture, the sub-tenants in this case had the right to exclusive possession against the tenant. The section then continues: "Provided that—(i.) this Act shall not, save as otherwise expressly provided, apply to a dwelling-house bona fide let at a rent which includes payments in respect of board, attendance, or use of furniture."

Mr. Safford for the tenant appellant argued (as I understood him; I am not sure that I did) that though this proviso appeared to exclude rooms let furnished from the operation of the Act, the previous provision that a part of a house was to be deemed to be a dwelling-house to which the Act applies overrode the proviso. This contention seems to me clearly erroneous; the proviso limits the definition, and prevents a "dwelling-house" let furnished from being a dwelling-house to which the Act applies.

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(1) [1928] 2 K. B. 486.

(2) Estates Gazette, June 12, 1926.

The next question is the effect as between landlord and tenant of the tenant's sub-letting the whole house furnished. This has been decided so as to bind this Court, in *Prout* v. *Hunter* (1), where it was held that such a sub-letting gave the landlord a right to possession against a statutory tenant; and, in my view, also deprived the sub-tenant of any protection under s. 5, sub-s. 5, or s. 15, sub-s. 3, of the Act of 1920, inasmuch as the house furnished was not one "to which the Act applied."

Then came the question of the effect of the sub-letting furnished being only of part of the original house. If the sub-letting did not include furniture the question would depend on whether the tenant continued to live in the part not sub-let. He has power to sub-let part: *Roe* v. *Russell* (2), but not the whole in parts: see the Act of 1920, s. 5, sub-s. 1 (*h*), as altered by s. 4 of the Act of 1923. His statutory protection depends on his still living in the house originally let: see the decision of this Court in *Haskins* v. *Lewis* (3), where the original tenant did not live in the house, and lost the right to two floors used as business premises and to two "dwelling-houses" let unfurnished to tenants. An order was made against him for possession of the whole house, though the sub-tenants would become tenants of the landlord under s. 15, sub-s. 3, of the Act of 1920.

When the tenant still lives in the house, though he has sub-let furnished rooms to tenants, apart from authority the position would seem to be as follows. The tenant has created two new "dwelling-houses," "parts of a house let as a separate dwelling," to which, being furnished, the Act does not by reason of the first proviso apply. Having created them he cannot complain against his landlord that he has lost, as far as they are concerned, the protection of the Act; that is what the Act says shall be the result of what he has done. The Act does say in the second proviso what the cases had already said, that he may use part of the premises for business if he lives in another part of the premises; it does not in my opinion say that if he lets to another to use as business premises, the part so let is within the Act. Mr. Safford ingeniously argued that the tenant here was living in part of the house and carrying on the business of letting furnished lodgings in the other part. This, in my view, is fallacious; he carried on the business in the part he lived in, not in the part which he had let to another and of which he had parted with exclusive possession. The second proviso must, in my view, be limited to premises used by the tenant for his business, and does not extend to parts let by him to an independent tradesman.

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(1) [1924] 2 K. B. 736.
(2) [1928] 2 K. B. 117.
(3) [1931] 2 K. B. 1.

As to the authorities, *Spurling* v. *Pugh* (1), which the Divisional Court have followed, is exactly the present case, a tenant living in part of the house let to him by the landlord sub-let the rest to various tenants furnished. The Divisional Court, reversing the county court judge, held that "the tenant had lost the protection of the Act as far as the furnished dwellings were concerned." But, curiously enough, two years later in *Ebner* v. *Lascelles* (2), in which *Spurling* v. *Pugh* (1) was not cited, Salter J. said: "My view is that the letting of a part of this flat furnished by the defendant had no effect in taking this flat or any part of it out of the operation of the Act as regards the right of the [tenant] to claim its protection against any increase of her duty to repair." The last part of the sentence refers to what was really in dispute in the case. By a series of lettings beginning in March, 1915, the landlord let to a tenant a residential flat in Brighton. During the series of lettings the rent was increased from 80*l.* to 150*l.* by contract, no notices being given under the Rent Restrictions Act. Also, by contract, the obligation to repair was increased, by putting on the tenant the obligation to repair damages caused by reasonable use and fair wear and tear. The tenant, except for a short time, never lived in the premises herself, and sub-let the ground floor of the premises furnished to a sub-tenant and other parts unfurnished to sub-tenants. In March, 1927, the contractual tenancy expired by effluxion of time, and the tenant left the

(1) Estates Gazette, June 12, 1926.

(2) [1928] 2 K. B. 486, 499.

premises, and before this date the sub-tenants had left the premises. The landlord then took possession, and sued for breach of the repairing covenant in its extended form. The tenant said the extended form involved an increase of rent, of which she had not the statutory notice, and also that the increase of pecuniary rent was in the same position, and claimed the excess of rent paid over the standard rent for the last six months of the tenancy. It will be noticed that at the time of action brought and at the end of the contractual tenancy there was no furnished sub-letting. If *Leslie & Co.* v. *Cumming* (1) was rightly decided on this point, as there had been apparently no structural alteration of the premises, when the furnished sub-letting ceased, the part so sub-let would come again within the protection of the Act. If it were necessary to consider the whole of the decision in *Ebner* v. *Lascelles* (2) it seems to me there are many points which would need reconsideration; as, for instance, first, whether the tenant who did not live in the premises had not lost the whole of the protection of the Acts: *Haskins* v. *Lewis* (3); secondly, whether the series of contractual renewals did not allow increases of rent under s. 3 of the Act of 1920, the increase being made by contract at a time when "but for the Act the landlord would be entitled to obtain possession." In any event the learned judge was talking about a hereditament not at the time of the writ in part sub-let furnished, and cannot have intended to reverse his own decision as to a case where the hereditament was at the time of the writ sub-let furnished. I therefore do not treat the Court in *Ebner* v. *Lascelles* (2) as declining to follow *Spurling* v. *Pugh* (4), and I reserve myself liberty to reconsider other points in *Ebner's* case (2) should it become necessary. In *Thompson* v. *Rolls* (5) Wright J. appears, obiter, to have taken the same view as was taken in *Spurling* v. *Pugh* (4); the point was also mentioned in *Leslie & Co.* v. *Cumming* (1), but not decided, because the landlord had only claimed possession of the whole premises, not of part, and the tenant by his family was apparently occupying the remainder of the premises.

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(1) [1926] 2 K. B. 417.

(2) [1928] 2 K. B. 486, 499.

(3) [1931] 2 K. B. 1.

(4) Estates Gazette, June 12, 1926.

(5) [1926] 2 K. B. 426.

Lastly in *Gidden* v. *Mills* (1), where the tenant, not himself occupying any part of the premises residentially, had sub-let part unfurnished for residence, and had converted the rest into a garage, which he used, the Court gave judgment for the landlord for possession of the garage, which was not a dwelling-house, but declined to give possession of the unfurnished dwelling-house. I think it follows from the decision of the majority of this Court in *Haskins* v. *Lewis* (2) that the landlord was entitled in *Gidden* v. *Mills* (1) against the tenant to possession of the whole premises, though the sub-tenant would by virtue of s. 15, sub-s. 3, of the Act of 1920, have become tenant of the landlord, entitled to the protection of the Act. *Gidden* v. *Mills* (1) however justifies an order as to part of the premises originally let, because that part had lost the protection of the Rent Restrictions Acts.

It follows that the order of the Divisional Court was correct. The result of the main order would be that the tenant could apply to the county court judge to apportion the original rent in respect of the part of the original dwelling-house in which she was residing, and would by virtue of the decision of this Court be entitled to such apportionment. Whether it would have been better to leave her to apply to the county court to apportion, instead of ordering the county court judge to apportion, seems to me an academic point. The order as drawn is in favour of the tenant; she cannot stay on without paying some rent, and she does not want to pay the whole rent for part of the premises. The appeal must be dismissed with costs.

GREER L.J. The appellant until May 5, 1930, was tenant to the plaintiff of No. 6 Ratcliffe Road, Forest Gate, at the rent of 14*s*. 4*d*. a week. On that date her contractual tenancy was determined by notice to quit, and such rights as she

(1) [1925] 2 K. B. 713.

(2) [1931] 2 K. B. 1.

might have after that date are confined to any she may have by reason of the Rent Restrictions Acts. Before the date of the expiration of the notice she had let to two separate sub-tenants five of the rooms in the house, furnished, retaining two rooms for herself, which she continued to occupy. After the expiration of the notice the plaintiff issued a plaint in the county court to recover possession: (*a*) of the whole house, or (*b*) in the alternative, of the part which was sub-let. The learned county court judge decided against the claim on the ground that he could not consider the rooms sub-let as separate dwellings under the Act. The plaintiff appealed to the Divisional Court, and the Court, consisting of Lord Hanworth M.R. and Romer J. (sitting as additional judges of the King's Bench Division), following the decision in the case of *Spurling* v. *Pugh* (1), allowed the appeal, and directed judgment to be entered in favour of the plaintiff for possession of such parts of the house which had been sub-let. The defendant appeals to this Court against that decision.

It was admitted in the course of the argument on behalf of the appellant that the sub-leases of the furnished rooms entitled the sub-tenants to exclusive possession of the rooms so sub-let, and that the sub-tenants were not merely lodgers with the rights of licensees.

It was contended on behalf of the appellant that the Court had no power under the circumstances of this case to award possession to the plaintiff of part of the house. It was argued in the first place that the effect of s. 12, sub-s. 2, of the Rent Restrictions Act, 1920, was that no part of the Act applied to the letting of part of a house on terms which included payment in respect of the use of furniture, and that the sub-tenants, who would have been sub-tenants of separate dwellings if the rooms had been let unfurnished, were not tenants of separate dwellings, because the proviso to sub-s. 2 says the Act is not to apply to a dwelling-house let at a rent which includes the use of furniture.

It was contended that the effect of sub-s. 2 is to bring within the Act the tenancies of parts of houses which are let unfurnished, but that tenants of separate parts of a house which are let furnished are not brought within the Act at all as separate dwellings. I think this contention is right. I think sub-s. 2 means that the Act is to apply to a part of the house let as a separate dwelling if it is not let at a rent including the use of furniture, but that no part of a house which is let at a rent which includes the use of furniture becomes a separate dwelling-house within the Act. Though not a separate dwelling-house within the Act, it in fact becomes a separate dwelling-house, but one to which the Act does not apply. The result of this construction of the sub-section is that the house occupied by the defendant never became three separate dwelling-houses within the Act, that is to say, two occupied by sub-tenants, and one occupied by the defendant. It was argued that this view of the sub-section was fatal to the landlord's case. I do not think so. In applying the Act one must never lose sight of the framework of the Act, and the way in which Parliament thought it right to protect the occupation of houses by tenants whose terms had under their contracts expired. The form in which protection was given was by placing a restriction on the power of the Courts to order possession to be given by a tenant whose term had expired. It has become convenient to refer to the rights of the occupier which arise by reason of the restriction put upon the Courts as a statutory tenancy, but it must always be kept in view that the rights of the landlord were only restricted to the extent provided for by the statute.

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(1) Estates Gazette, June 12, 1926.

Sect. 5 of the Act of 1920 provides that no order or judgment for the recovery of possession of any dwelling-house to which this Act applies or for the ejectment of a tenant therefrom shall be given except in certain cases, which are enumerated in sub-s. 1. It is not contested in the present case that if the Court has regard to the whole of the house which was let to the defendant, no order for recovery of possession of such house, or to eject the tenant therefrom, can be made, there being no evidence that any of the excepted cases have come into operation, but judgment was not given by the Divisional

Court for possession of the whole dwelling-house, but only for possession of the parts which had been sub-let furnished, as to which the operation of the Act is excluded by the proviso in s. 12, sub-s. 2.

It has been decided that the status of the premises, the occupier's right to remain in possession under the Rent Restrictions Acts, and the landlord's right to recover possession by order of the Court, have to be determined as at the date when proceedings for recovery are taken. It seems to me, though the point is not free from doubt, that upon the facts of the present case the plaintiff was entitled to say: "At common law the defendant's right of occupation of the house has gone. If it had not been for the provisions of the Act I would be entitled to possession of every part of the house. It is true that the statute prevents me from recovering every part of the house, but it does not prevent me from exercising my common law rights with regard to that part of the house which at the date when my proceedings commenced was outside the protection of the Act." *Prout* v. *Hunter* (1), a decision of the Court of Appeal, affords authority for the proposition that the status of the house is to be determined not by the terms of the contract under which the tenant originally held, but by the status of the house as indicated by the user to which it is being put at the date of the proceedings. It seems to me to follow logically that the status of every part of the house separately occupied must be determined as at the same date. In *Gidden* v. *Mills* (2) I decided that the landlord was entitled to recover a portion of the premises that had been let which had been converted into business premises, and which were then outside the protection of the Act, though having regard to sub-tenancies he could not be put in possession of the rest of the premises included in his lease. It is true that in *Haskins* v. *Lewis* (3) the Court of Appeal held that the proper order in such a case was an order for possession of the whole of the premises, which would have the same result as an order for possession of the business portion, that is to say, the sub-tenants would, under s. 15, sub-s. 3, be deemed to become the tenants of the landlord, but the decision does not, in my judgment, raise any doubt on the point that in a proper case judgment may be given for recovery of such part of the premises as are outside the protection of the Act. The matter has been considered from time to time. In a case which is concerned with the question of alternative accommodation, *Thompson* v. *Rolls* (1), Wright J., in the course of his judgment, said this (2): "I think it might well have been held on the facts as they appear that the two rooms which were sub-let furnished were a separate dwelling within the meaning of s. 12 of the Act of 1920, and being let furnished were outside the protection of the Act. In those circumstances, when the plaintiff brought her claim for possession she could only be met with the defence provided by the statute as regards the premises other than those two rooms. It is clear from *Prout* v. *Hunter* (3) that in questions of this nature what has to be looked at is the status of the premises at the time the question arises. It is also clear from *Gidden* v. *Mills* (4) that in a claim for possession of the whole of the premises the Court may limit its order to that part of the premises to which the provisions of the Rent Restriction Acts do not apply."

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(1) [1924] 2 K. B. 736.
(2) [1925] 2 K. B. 713.
(3) [1931] 2 K. B. 1.

I agree with this view of Wright J., with the exception that I do not think letting a furnished part of the premises constitutes such part a separate dwelling-house within the meaning of the Act. It seems to me that they are expressly excluded from every part of the Act by the proviso. But I do not think this affects the question whether the plaintiff's common law right to resume possession of such parts of the dwelling-house as the Act no longer applies to, is prevented by reason of the fact that there is still a portion of the premises originally let which the Act disentitles him to recover possession of.

It follows from what I have said that I agree with the decision in *Spurling* v. *Pugh* (5), which the Divisional Court followed in the present case, and I do not agree with the contrary view expressed by Salter J. in *Ebner* v. *Lascelles* (1), if it is intended to apply to a case where the furnished sub-tenancy exists at the date of the proceedings. The learned judge said (2): "My view is that the letting of a part of this flat furnished by the defendant had no effect in taking this flat, or any part of it, out of the operation of the Act as regards the right of the defendant to claim its protection against any increase of her duty to repair." If by this the learned judge meant that the parts so let at the date of proceedings to recover possession cannot be so recovered, I disagree with that view. In that case when the question, which was one relating to an increase of rent by imposing additional burdens on the tenant, arose for discussion, the furnished sub-lease had come to an end.

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(1) [1926] 2 K. B. 426.

(2) Ibid. 436.

(3) [1924] 2 K. B. 736.

(4) [1925] 2 K. B. 713.

(5) Estates Gazette, June 12, 1926.

In my judgment the decision of the Divisional Court was right for the reasons above stated, which are, I think, similar to those which led the Master of the Rolls to the same conclusion.

Slesser L.J. This is an appeal from the judgment of a Divisional Court (Lord Hanworth M.R. and Romer L.J.). By the judgment of the Divisional Court the plaintiff, the landlord, became entitled to recover the possession of those parts of the house which had been let out furnished to sub-tenants, the tenant being allowed to rely upon the protection of the Rent Restriction Acts with regard to that part of the house which she did not so sub-let. From this judgment the tenant appeals.

It is conceded that the sub-leases of the furnished rooms entitled the sub-tenants to exclusive possession of those rooms. No suggestion that the sub-tenants are mere lodgers is made.

The original claim of the landlord was for possession of the whole house or, alternatively, possession of all those rooms which the defendant had sub-let furnished. It is on the latter alternative plea, therefore, that she has succeeded.

(1) [1928] 2 K. B. 486.

(2) [1928] 2 K. B. 499.

The tenancy, so far as it depended upon contract, was duly determined on May 5, 1930, as regards the whole house, and the tenant, to retain possession of the house or any part of it, is driven to rely upon the statutory provisions of the Rent Restrictions Acts and, if she cannot find protection therein, after the expiration of the notice to quit, she or her sub-tenants became trespassers—of such parts, if any, as were no longer within the Acts.

By s. 12, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, it is provided that: "This Act shall apply to a house or part of a house let as a separate dwelling"; and that "every such house or part of a house shall be deemed to be a dwelling-house to which this Act applies." By para. 1 of the proviso to the same section of the 1920 Act it is enacted: "This Act shall not, save as otherwise expressly provided, apply to a dwelling-house bona fide let at a rent which includes payments in respect of . . . . use of furniture." In *Prout* v. *Hunter* (1) the tenant of a flat furnished the flat and sub-let it. It was argued for the tenant that the proviso excluding the protection of the Act to a dwelling-house let at a rent which includes payments in respect of furniture applied only to the case of such a dwelling-house so let by the party applying for possession, but the Court of Appeal held otherwise. The Court decided that the status of the house is to be determined by its use at the time when proceedings are actually taken. Scrutton L.J. said (2): "There is no longer a dwelling-house within the Act, but a furnished house to which the Act has expressly said the provisions as to ejectment shall not apply." Sargant J. said (3): "The flat must . . . . be considered with reference to its actual occupation as being a dwelling-house let furnished and therefore as being outside the protection of the Act." This view, which was the view of the whole Court, applied to the circumstances of the present case, would clearly have the effect of preventing the appellant from relying upon the Rent

(1) [1924] 2 K. B. 736. (2) [1924] 2 K. B. 743.
(3) [1924] 2 K. B. 745.

Restrictions Acts if she had let the whole house furnished and not retained a portion for herself. Does it make her position any different that she has not let the whole dwelling-house but only a part of it furnished? On this question there are two conflicting judgments of the Divisional Court: *Spurling* v. *Pugh* (1) ordering judgment in favour of a plaintiff for possession of parts of a house which had been so sub-let furnished, and *Ebner* v. *Lascelles* (2), in which Salter J. said (3): "My view is that the letting of a part of this flat furnished by the defendant had no effect in taking this flat, or any part of it, out of the operation of the Act as regards the right of the defendant to claim its protection against any increase of her duty to repair."

I agree with the view of the Divisional Court in this case that *Spurling* v. *Pugh* (1) was rightly decided. In my view, the tenant by her own act, by partitioning the house in letting a part of it furnished, divided it into two separate dwellings under s. 12, sub-s. 2.

I cannot read the first paragraph of the proviso to s. 12, sub-s. 2, that the Act shall not apply to a house let at a rent which includes payments in respect of the use of furniture, so as to exclude the governing words of sub-s. 2, which say that part of a house shall be deemed to be a dwelling-house to which the Act applies. To do so would be to "sin against the fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso": per Moulton L.J. in *Rex* v. *Dibdin*. (4) The effect of an excepting proviso according to the usual rule of construction, is to except out of the preceding portion of the enactment something which, but for the proviso, would be within it: *Duncan* v. *Dixon*. (5) Thus, in my view, s. 12, sub-s. 2, having declared that parts of dwelling-houses shall be deemed to be dwelling-houses, the proviso in para. 1 has done no more than say that the Act shall not apply to a whole house or to such a part of a house so let at a rent which includes the use of furniture. Such a view deprives the sub-tenant of any protection under s. 5, sub-s. 5, and s. 15, sub-s. 3, which he might otherwise possess, as the Act as a whole does not apply to his part of the dwelling-house which is deemed to be itself a dwelling-house. In *Thompson* v. *Rolls* (1) Wright J appears to have anticipated, obiter, the decision in *Spurling* v. *Pugh*. (2) He said: "I think that the two rooms which were sub-let in this way"—that is sub-let furnished—"might well have been held to be a separate dwelling." In *Leslie & Co.* v. *Cumming* (3), where two rooms were let of the demised premises, Roche J. said (4): "The plaintiffs, if they had claimed possession of the two rooms let . . . . might have succeeded. It is, however, unnecessary to decide that point. The plaintiffs' claim was for possession of the whole premises." As in my view the proviso to s. 12 is inoperative to prevent the part of the house sub-let being deemed to be a separate dwelling, it follows that I agree with the view taken by Wright J. and indicated by Roche J.

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(1) Estates Gazette, June 12, 1926.

(2) [1928] 2 K. B. 486.

(3) [1928] 2 K. B. 499.

(4) [1910] P. 57, 125.

(5) (1890) 44 Ch. D. 211.

Thus, in my view, each of the portions sub-let furnished is to be deemed to be a separate dwelling-house, and the proviso relied upon by Mr. Safford does not operate to prevent this. There being, therefore, three notional separate dwelling-houses, only one of which is now protected by the Acts, the other two being sub-let at a rent which includes the use of furniture, the combined effect of the cases of *Prout* v. *Hunter* (5) and *Gidden* v. *Mills* (6) concludes this appeal against the appellant.

Appeal dismissed.

Solicitors for appellant: *Bishop & Fenton-Jones.*
Solicitor for respondent: *Herbert A. Phillips.*

(1) [1926] 2 K. B. 426, 437.

(2) Estates Gazette, June 12, 1926.

(3) [1926] 2 K. B. 417.

(4) [1926] 2 K. B. 423.

(5) [1924] 2 K. B. 365, 736.

(6) [19252] K. B. 713.

J. S. H.

C. A.

1930

Dec. 15, 16.

HAYTER *v.* SOUTHERN RAILWAY.

Workmen's Compensation—Accident—Recorded Agreement to pay Compensation—Employers' Notice to end Compensation—Certificate of Employers' Doctor—No Counter-certificate—Right of Workman to issue Execution—Judgment Creditor—Employers' Right to review—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *ss.* 11, 12—*Workmen's Compensation Rules,* 1926, *r.* 82, *sub-rr.* 1, 3, 5.

In August, 1929, a workman met with an accident, and was paid full compensation by his employers. In April, 1930, an agreement was recorded under which he was paid compensation at an agreed rate. In July the employers obtained a certificate from their doctor that the workman had practically recovered from the accident in 1929, and served upon the workman a notice of their intention to terminate the compensation under the provisions of s. 12 of the Workmen's Compensation Act, 1925. The workman did not follow the procedure prescribed by that section, but applied under r. 82 of the Workmen's Compensation Rules, 1926, for leave to issue execution under the recorded agreement. The county court judge refused the application:—

Held, that under the recorded agreement a workman was in the position of a judgment creditor, and was entitled under r. 82 to apply for leave to issue execution, notwithstanding the fact that the employers had already commenced proceedings under s. 12 to terminate or reduce the weekly payments under the recorded agreement.

But, *held,* that the employers could always apply under r. 82, sub-r. 5, for an adjournment of the application to enable them to proceed under s. 11 of the Act by way of review.

Held, therefore, that leave to issue execution ought to be allowed, but that execution ought to be suspended for one month to enable the employers to apply for a review.

Pudney v. *William France, Fenwick & Co., Ld.* [1925] 1 K. B. 346 applied.

Appeal from a decision of the deputy judge of the Kingston-on-Thames County Court sitting as arbitrator under the Workmen's Compensation Act, 1925.

The applicant Hayter was a workman in the employment of the respondents, the Southern Railway. On August 11, 1929, he met with an accident. A piece of steel entered his right eye, resulting in the loss of the eye, and leaving the left eye affected. Total incapacity was admitted by the respondents, and the applicant was paid by them full compensation. On March 21, 1930, a memorandum of agreement for payment at an agreed rate was entered into

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between the applicant and the employers, which was duly recorded by the Registrar in the county court in the August following.

On July 16, 1930, the employers having obtained a certificate from their doctor that the applicant had practically recovered from his accident, served upon him a notice under s. 12 of the Workmen's Compensation Act, 1925, of their intention to discontinue the weekly payments under the recorded agreement. The applicant did not follow the procedure prescribed by that section, but on August 20, 1930, he applied under r. 82 of the Workmen's Compensation Rules, 1926, for leave to issue execution under the recorded agreement.

On September 19, 1930, the deputy county court judge refused to grant the leave asked on the ground that the applicant ought to have followed the procedure prescribed by s. 12.

The applicant appealed. The appeal was heard on December 15 and 16, 1930.

Eastham K.C. and *Edgar Dale* for the appellant. The applicant is not precluded by reason of the employers having taken proceedings under s. 12 of the Act from pursuing the right given him by r. 82 of applying for leave to issue execution under the recorded agreement: *Pudney* v. *William France, Fenwick & Co.* (1) Sect. 12 does not give to an employer any greater right to stop payments than he had before the section was passed. Under a recorded agreement the workman is in the position of a judgment creditor: *Major* v. *South Kirkby, Featherstone and Hunsworth Collieries, Ld.* (2) The applicant having therefore the right to issue execution under the recorded agreement to issue execution, that right is not taken away by s. 12.

[They also referred to *Davies* v. *Glyncorrwg Colliery Co.* (3); *James* v. *Gravesend Steel and Tinplate Co.* (4); *Anchor Donaldson, Ld.* v. *Crossland* (5); *Ocean Coal Co.* v. *Davies.* (6)]

(1) [1925] 1 K. B. 346.
(2) [1913] 2 K. B. 145.
(3) [1925] 2 K. B. 339.
(4) (1925) 18 B. W. C. C. 405.
(5) [1928] W. N. 305; 21 B. W. C. C. 448.
(6) [1927] A. C. 271.

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Beney and *A. T. Denning* for the respondents. It is admitted that the workman cannot be deprived of his right to issue execution by reason of the employers having invoked the procedure under s. 12 of the Act. That section deals only with interim and not ultimate rights. Before leave to issue execution is granted an opportunity ought to be afforded the employers of applying for a review under s. 11.

[They referred to *Ibrahim Said* v. *J. H. Welsford & Co., Ld.* (1); *Catton* v. *Ashwell & Nesbit, Ld.* (2)]

Eastham K.C. replied.

Lord Hanworth M.R. This appeal succeeds. It is important to say, if words can do it, what we decide and what are the limits of our decision. The facts of the case are these. On August 10, 1929, this workman unhappily suffered a serious accident. A piece of steel from a chisel went into his right eye, and the result was that he actually lost the right eye—I think it had to be removed—and there was further injury caused to the left eye. The employers, the Southern Railway, as other employers do, shouldered the responsibility at once, and they paid the workman full compensation down to March 21, 1930. They then entered into an agreement with him, whereby they were to continue to pay compensation on the basis that they recognized that he was an injured man, and obviously a seriously injured man. That agreement was recorded on April 5, and thereafter the payments that were made by the employers to the injured workman were made on the basis of that agreement. The Workmen's Compensation Act, 1925, provides for the recording of agreements. It is a plan which is effective as between the two parties and of very considerable force.

In *Major* v. *South Kirkby, Featherstone and Hunsworth Collieries, Ld.* (3), to which reference has been made, Cozens-Hardy M.R. points out that a workman who has a recorded agreement for compensation has for most purposes in effect an award of the Court. He says (4): "The workman is in the position of a judgment creditor; the employer is in the position of a judgment debtor, and without taking any further independent proceedings, without suing upon the agreement or upon the award, he can levy execution upon the award or upon the recorded agreement," and thus the workman's position is as good as if he had obtained an order under an award.

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(1) (1910) 3 B. W. C. C. 233.

(2) [1928] Ch. 484.

(3) [1913] 2 K. B. 145.

(4) Ibid. 150.

Rule 82 of the Workmen's Compensation Rules, 1926, which is a rule made under the authority for making rules, provides that where a party is liable to pay compensation under a memorandum—that is a recorded agreement—an application can be made to the Court for leave to issue execution. The necessity for that rule, and the procedure under it, is based upon what the learned Master of the Rolls had pointed out in the case to which I have referred—namely, that the matter transit in rem judicatam; that the workman was in the position of a judgment creditor, and what was necessary for the fulfilment of his rights was to obtain execution.

Now as a matter of fact the employers went on making payments down to July, 1930, but in July they obtained a certificate dated July 15 from the doctor, which was in the following terms: "I have examined the above-named man and I am of the opinion that his present incapacity is due to his fall on or about May 24th last"—that is, subsequent to the agreement being recorded—"and I do not see any connection with his previous accident, from which he seems to have recovered." The employers sent a notice based upon that certificate to say that they would cease payment, and they have ceased payment from the lapse of ten days from that notice, that is, from July 26. The employers did that because there is a procedure under s. 12, sub-s. 3, of the Act of 1925, whereby it is open to employers to obtain a certificate of a doctor, to serve a notice based on that certificate upon the workman, and give him that notice of the intention of the employers at the expiration of ten clear days from the date of the service of the notice to end the weekly payments. There is a proviso to that section which gives an opportunity to the workman to obtain a report of a duly qualified medical practitioner, and then if the terms of it warrant, the workman can serve a notice upon the employer disagreeing with the certificate served by the employer, and then proceedings can be taken, whereby those two certificates in opposite senses, or in differing senses, may be submitted to a medical referee and a final decision reached, as to whether the employer's certificate or the workman's certificate is right. The workman, however, in the present case did not accept the opportunity which was open to him of serving a counter-notice on the employer. Instead of doing that he applied for leave to enforce the recorded agreement by an application on August 20. That application went first of all before the Registrar, who refused it, and then went by way of appeal before a deputy county court judge on September 19. The deputy county court judge rejected the appeal, and concurred with the Registrar in refusing to allow execution to issue. From that decision the appeal is brought to this Court.

Now the reason why the deputy county court judge refused to issue execution appears to have been that he thought that the workman ought to have followed up the procedure initiated by the employers under s. 12, and that because he had not done so he was prevented from taking the step open to him to ask for leave to issue execution under r. 82. We have had an admirable note taken by counsel for the respondents of the decision of the deputy county court judge, and we are much obliged to counsel for having taken so full a note. It enables us to see that the deputy county court judge based his refusal to allow execution to issue entirely upon the alternative procedure which was available to the workman, inasmuch as the employers had started to put s. 12 into operation.

We have come to the conclusion that the decision of the deputy county court judge cannot stand. Under r. 82 provision is made where the employer desires to dispute the right to issue execution on the ground that the incapacity of the workman has wholly or partially ceased. By sub-r. 5, if the party liable to execution alleges that the incapacity has wholly or partially ceased, the judge may, on such terms as to payment into Court or otherwise as may be just, adjourn the application to such time as he thinks fit, to enable the party liable to execution to file a request for arbitration with respect to the review of the weekly payment; in other words, where the procedure of r. 82 is initiated by the workman, the rights of the employer are safeguarded to him, and before a final decision as to whether execution shall issue or not, an opportunity is given to the employer to proceed to ask for a review under s. 11. It is to be noted that the terms of r. 82, particularly of sub-r. 3, and, I think, of sub-r. 5, indicate that the workman is entitled to have leave to issue execution granted to him, he being a judgment creditor, unless just cause is shown to the contrary: see sub-r. 3, which deals with the application before the Registrar; and, again, sub-r. 5, which indicates the procedure where the party liable desires to raise the question of the ceasing wholly or partially of the incapacity. Hence, under r. 82 the rights of both parties are preserved.

In *Pudney* v. *William France, Fenwick & Co.* (1), we held that the fact that proceedings might have been continued under s. 12 did not take away the right of the workman to proceed to ask for an arbitration, and a consequent award. In *Pudney's* case (1) the agreement was not recorded. The workman, instead of complying with the terms of the section, which was then equivalent to s. 12 of the present Act, instituted arbitration proceedings for compensation generally under his powers under the Act, and it was held that the fact that the workman did not exercise the right given to him under the equivalent section to s. 12, did not deprive him of his ordinary right under the Workmen's Compensation Act to commence arbitration proceedings for compensation. By parity of reasoning, it seems to me clear that where there are these two methods of determining a question which has arisen subsequently to an agreement between parties, it cannot be said that the workman's right to ask for execution

(1) [1925] 1 K. B. 346.

as a judgment creditor is taken away because he does not respond to the procedure initiated by the employer under s. 12. Just as in *Pudney's* case (1) it was held that the workman could ask for arbitration, so here he can under r. 82 apply for leave to issue execution, and under that procedure the employer has a right to show cause against the issue of execution, and to demand that an opportunity should be given to him to test the question of whether the capacity has ceased or not by a review.

We therefore think that the deputy county court judge has gone wrong in refusing this application, or treating the application of the workman as excluded by the fact that the employers had initiated proceedings under s. 12.

I do not desire to go through all the multitude of cases which have been decided. It is perhaps wiser to refer to this, that in the case of an unrecorded agreement the payment that is made to the workman is made in consequence of the rights of the workman under the Act, and Lord Loreburn points out in *Smith* v. *D. Davis & Sons, Ld.* (2), that the fact that the agreement is unrecorded does not prevent the payment being a matter of right on the part of the workman; it connotes an agreement. That, however, does not apply to the present case, because we have here, upon the facts, not merely an agreement under which payment is being made, but a recorded agreement, which gives the right to the workman to apply under r. 82. It is of importance to the workman because, of course, some difference is made in the onus of proof. I do not shrink from sharing the view, which has already been expressed by Lawrence L.J., that it may be right to throw the onus of proving that the incapacity has partially or wholly ceased upon the employers, because under the agreement which is now effective as a judgment it has been determined that the workman is entitled to receive compensation at the hands of the employers.

I think the view that we have presented is in accordance with *Moakes* v. *Blackwell Colliery Co.* (3) I may add this,

(1) [1925] 1 K. B. 346.

(2) [1915] A. C. 528.

(3) [1917] 1 K. B. 565.

that inasmuch as the workman has proceeded under r. 82 on the basis that the weekly payments have been stopped, it would not be open to him to take proceedings under some other part of the Act on the basis that he was entitled to receive and to enforce continuance of payments, because the whole of this procedure, which must be carried out now under the order of the Court, proceeds on the hypothesis that the employers have stopped their payments.

The order, therefore, will be to allow the appeal, and to say that execution ought to be allowed to issue, but to suspend the operation of that order for a month in order to enable the employers, if they are so advised, to apply for a review of the proceedings under s. 11, and if those proceedings are initiated within one month from to-day, then an order suspending the operation of the execution until the question raised by the employers under s. 11 has been determined.

I think also that the workman is entitled to the costs of this appeal. It has been suggested by counsel for the respondents that a somewhat different point was argued in the county court, and that he came here to argue a wider point before this Court. That may be so, but the workman had to come to this Court for the purpose of obtaining his rights under r. 82, which have been accorded to him, and there is no sufficient reason for interfering with the ordinary rule under which the successful party on an appeal is granted his costs.

LAWRENCE L.J. In concurring in the judgment delivered by the Master of the Rolls, I should like to make it plain that I reserve my opinion upon the question whether s. 12 extends to any payments except payments made under agreements that are not recorded. In the present case, the question whether the section extends to recorded agreements or awards is immaterial, because in any case I am of opinion, on the authority of *Pudney's* case (1), that it was open to the workman to proceed under r. 82 for leave to issue execution, and if that step be taken by the workman I think the county court judge ought to consider whether he should not adjourn the application under sub-r. 5.

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(1) [1925] 1 K. B. 346.

In our judgment such an adjournment ought to have been ordered in the circumstances of this case.

SLESSER L.J. I agree. Rule 82 provides the method whereby the workman, when he is in possession of a recorded agreement, may proceed to execution in default under it. The employer in this case, a notice having been served upon him under sub-r. 2 of r. 82, has his right provided under sub-r. 5 to ask for an adjournment which the Court may allow on such terms as to payment into Court, or otherwise, as it may think just. Upon that the employer has his full rights under s. 11 to apply for a review, and it is to be observed that the whole of this machinery, both the power to ask for leave to issue execution and the right to ask for a review, existed before the coming into being of s. 12, and the peculiar obligations as to payments made and provisos as to when the obligations to make payment can be avoided under that section. It is to be found in the Act of 1906. While I also wish to reserve the consideration of the wider question whether s. 12 is at all appropriate to deal with this matter of the recorded agreement, I am clearly of opinion that the rights which have previously existed before the coming into existence of s. 14 as it was of the Act of 1923, now s. 12 of the Act of 1925, have been in existence since the passing of the Workman's Compensation Act, 1906, with the possible exception of sub-r. 5 of r. 82, which has made the position of the employer slightly more favourable than it was before that time as to reviews; that these rules which have continued throughout that time always were for the assistance of workmen in obtaining execution under the recorded agreement; and that nothing that has been argued and nothing in the legislation has deprived the workman of the rights which that section gave to him.

The learned deputy county court judge appears to have proceeded on the principle that s. 12 had invaded that right given to the workman under r. 82. I think that is wrong, and that the workman's rights stand as they stood at the time when *Moakes* v. *Blackwell Colliery Co.* (1) fell to be decided. In that case the workman sought to embark upon an arbitration in the face of a memorandum which had already been recorded. It was held that, as there was already a memorandum of an agreement on the register, there was no jurisdiction to hear the arbitration. Lord Cozens-Hardy M.R. said (2): "In fact, when you remember that a memorandum of an agreement is really for all intents and purposes exactly the same as an order made by the Court, it seems to me reasonably plain that the Court must have power to enforce its own orders, and that power is expressly given, with very careful safeguards by r. 82, sub-rr. 1, 2, 3 and 4." In that case it was held that r. 82 prevented the workman from opening proceedings before the Court, otherwise than according to the machinery of that rule, I believe those observations still have force, and that at the present time the workman is fully entitled to have execution of the agreement, subject to the rights given to the employer under sub-r. 5 of that rule, and as the Court is now granting that adjournment under sub-r. 5, as it ought and might have been granted under the original application, the position is, in my opinion, that the matter is still open to the employer to have all the rights of review under s. 11, which he might have had if he had originally put his application in proper form; with this difference, that he will now have to prove that the workman has recovered in whole or in part, whereas if his contention had been granted, it would have lain upon the workman, in spite of the recorded agreement, to have maintained that he had not so recovered.

Appeal allowed.

Solicitors for appellant: *L. Bingham & Co.*
Solicitor for respondents: *W. Bishop.*

(1) [1917] 1 K. B. 565. (2) [1917] 1 K. B. 570.

W. I. C.

C. A.
1931
April 30;
May 1.

WINFIELD *v.* LONDON MIDLAND AND SCOTTISH RAILWAY COMPANY.

Workmen's Compensation—Accident—Recorded Agreement to pay Compensation—Employers' Notice to reduce amount of Weekly Payments—Certificate of Employers' Doctor—No Counter Certificate—Application by Workman for leave to issue Execution under Recorded Agreement—Right of Review open to Employers—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *ss.* 11, 12—*Workmen's Compensation Rules,* 1926, *r.* 82.

In 1928 a workman having met with an accident his employers paid him full compensation of 30*s.* a week on the basis of total incapacity. In August, 1930, an agreement was recorded under which the payments of 30*s.* a week were to be continued by the employers. In January, 1931, the employers, following the procedure prescribed by s. 12 of the Workmen's Compensation Act, 1925, served upon the workman a notice, in accordance with a certificate of a medical practitioner which stated that the workman had partially recovered, that they would from and after the expiration of ten days therefrom reduce the weekly payment of 30*s.* under the recorded agreement to 11*s.* 1*d.* The workman did not follow the procedure open to him under the proviso to sub-s. 3 of s. 12 of the Act, but applied to the Registrar under r. 82 of the Workmen's Compensation Rules, 1926, for leave to issue execution under the recorded agreement. The matter was referred by the Registrar to the judge, who held that the workman was entitled to leave to issue execution unless the employers applied for a review.

On appeal by the employers:—

Held, following *Hayter* v. *Southern Railway*, ante p. 274, that leave to issue execution ought to be granted, as the certificate of the employers' doctor, on which they relied as a ground for ending the compensation, was not final and conclusive, and did not establish partial incapacity, and therefore they were in default in making weekly payments under the recorded agreement within the meaning of r. 82, sub-r. 1; but that the execution must be suspended in order to give the employers an opportunity to apply for a review under s. 11 of the Act.

APPEAL from a decision of the judge of the Bloomsbury County Court sitting as arbitrator under the Workmen's Compensation Act, 1925.

On April 30, 1928, the applicant met with an accident whilst in the employment of the respondents, and was paid by them full compensation on the basis of total incapacity.

On September 12, 1930, a memorandum of agreement between the applicant and the respondents was recorded in the Bloomsbury County Court. The agreement provided that the respondents should pay to the applicant compensation at the rate of 30*s.* a week, such weekly payment to continue during the total or partial incapacity of the applicant for work, or until the same should be ended, diminished, increased or redeemed in accordance with the provisions of the Workmen's Compensation Act, 1925.

The respondents paid compensation to the applicant at the rate agreed until February 6, 1931, when they reduced the weekly payment to 1*l.* 3*s.* 8*d.*, and apparently from an affidavit of the applicant sworn on February 16, again reduced it as from some date that the affidavit did not make clear to 11*s.* 1*d.*, and on February 16 the payments made to the applicant by the respondents fell short of the sum which he would have received at the rate of 30*s.* a week by 1*l.* 5*s.* 3*d.*

Thereupon the applicant applied for leave to issue execution.

The application came before the Registrar on February 16, when the respondents admitted that the amount paid by them to the workman fell short of 30*s.* a week by the amount alleged, but showed cause against the giving of leave on the ground that on January 20, 1931, they had served on the applicant a copy of a certificate in the form and to the effect indicated in s. 12, para. 3, of the Act, together with a notice of their intention at the expiration of ten clear days from the date of the service of the notice to diminish the weekly payment provided for by the agreement, a memorandum of which had been reduced to 11*s.* 1*d.*, and that no report such as was indicated in the first proviso to s. 12 had been sent to them by the applicant within the ten clear days or at all.

The facts so put forward by the respondents were admitted by the applicant, and the Registrar in the circumstances dismissed the application for leave to issue execution.

On appeal by the applicant against that order the county court judge held that the applicant was entitled to leave to issue execution unless the respondents applied that the application be adjourned in order to enable them to file a request for arbitration with respect to the review of the weekly payment fixed by the agreement of which a memorandum had been recorded, in which case he would consider on what terms that application ought to be granted.

By arrangement between the parties an order was made as follows: "The respondents undertaking to pay to the workman 30*s*. a week as from September 6, 1930, and to continue payments at that rate until the appeal is disposed of application for leave to issue execution adjourned until appeal is disposed of. Stay of execution with regard to costs."

The respondents appealed. The appeal was heard on April 30 and May 1, 1931.

Cave K.C. and *Bertram Reece* for the appellants. The respondent is not entitled to leave to issue execution. Under the recorded agreement of September 12, 1930, the appellants were only to pay composition at 30*s*. a week until the same should be ended or diminished. One of the proper modes of reducing the composition is by notice under s. 12 of the Act in accordance with a certificate of a medical practitioner that the workman had partially recovered, and that it was intended to make the reduction after ten clear days. The workman should have followed the procedure laid down in s. 12, sub-s. 3. The right to apply for leave to issue execution is conferred by r. 82 of the Workmen's Compensation Rules, 1926, and is limited to the case where the employer "has made default in payment of the" compensation. Here there was no default, as the course provided by s. 12 was followed. For the respondent it will be contended that the case is concluded against the appellants by *Hayter* v. *Southern Ry.* (1) The facts in that case are indistinguishable, but there counsel conceded the right to issue execution even though s. 12 applied. That is the very point that it is now sought to argue.

[LAWRENCE L.J. That argument is difficult to reconcile with *Pudney* v. *William France, Fenwick & Co.* (2)]

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(1) Ante p. 274.

(2) [1925] 1 K. B. 346.

If a workman is to be entitled to issue execution where the employer has adopted the procedure under s. 12, that procedure becomes useless. The recorded agreement recognized the power to diminish the weekly payments on partial incapacity supervening. The employers were not in default, and the procedure under r. 82 is not available.

Ellis Hill for the respondent. This case is completely covered by *Hayter* v. *Southern Ry.* (1) The point now being taken is not new, but is similar to that which arose in *Pudney* v. *William France, Fenwick & Co.* (2) The only difference is that in *Pudney's* case (2) there was not a recorded agreement. A recorded agreement is given by s. 23 the same effect as a county court judgment. In *Pudney's* case (2) this Court overruled the objection that there was no default. The only difference between the cases is that under *Pudney's* case (2) the workman had to apply for an award. Here the recorded agreement operates as an award, and it is enforceable by execution. There is a clear decision that s. 12 does not when resorted to limit any remedy conferred by the Act.

The Registrar ought to have said that he would adjourn the application and give the employers an opportunity of applying for a review, and that if they did so the stay of execution would be continued, but that if they did not apply he would grant leave to issue execution under the recorded agreement.

The employers may discontinue the weekly payments if the disability has ceased: *Ocean Coal Co.* v. *Davies.* (3)

[He was stopped.]

Cave K.C. replied.

LORD HANWORTH M.R. This appeal must be dismissed. It raises a difficult and intricate point, and we are much indebted to counsel on both sides who have given us assistance in trying to solve it. The facts can be quite simply stated. On April 30, 1928, the workman unhappily suffered an accident, and he was paid by his employers full compensation on the basis of total incapacity. On August 12, 1930, an agreement to that effect was entered into and was recorded, and payments of 30*s.* a week under that recorded agreement were continued by the employers. On January 20, 1931, the employers served a notice in accordance with a certificate of a doctor, which they had obtained, following the procedure open to them under s. 12 of the Act, stating that the man had partially recovered, and that, from and after the expiration of the ten days limited by sub-s. 3, they would reduce the sum payable by them from the 30*s.* due under the recorded agreement to a sum of 11*s.* 1*d.* The workman did not take advantage of the procedure open to him under the proviso to that sub-s. 3. He did not send to the employer the report of a duly qualified medical practitioner disagreeing with the certificate so served by the employers. What he did was, on February 9, to apply to the Registrar under r. 82 for leave to issue execution pursuant to the rights given to him under the recorded agreement. The matter was referred to the judge by the Registrar, and the learned judge held that the applicant, the workman, " is entitled to leave to issue execution unless the respondents apply for a review " ; in other words, the learned judge adopted the procedure which is offered in sub-r. 5 of r. 82, whereby an opportunity can be given to the employers to apply for a review under s. 11 of the Act. From that decision of the learned judge the appeal is to this Court, terms being arranged whereby the respondents have undertaken to continue that payment of 30*s.* a week until this appeal is disposed of, and the application for leave to issue execution is adjourned.

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(1) Ante p. 274.

(2) [1925] 1 K. B. 346.

(3) [1927] A. C. 271.

Counsel for the employers, the appellants, take three points before us. They say that the agreement which is recorded is not an absolute agreement; it is an agreement which contains the proviso that, although they are to pay the 30*s.* a week to the man, " such weekly payment is to continue during the total or partial incapacity of the workman for work or until the same shall be ended, diminished, increased or redeemed in accordance with the provisions of the above mentioned Act." They argue that, inasmuch as the agreement itself provides for the possible reduction of the weekly payment, and does not impose absolute liability upon them in any event and for all time to pay 30*s.* a week they have, in accordance with the agreement, taken the procedure open to them under s. 12, with the result that, under the very terms of s. 12, they are entitled to end the weekly payment, or, rather, to reduce it, because in effect s. 12 is to be read as giving the employer affirmatively the right to reduce if he follows the procedure indicated by the section. Next they say that inasmuch as the employers have followed out s. 12, and by the certificate of the doctor their liability has become diminished to 11*s.* 1*d.* per week, it cannot be shown by the workman under r. 82 that the employers are in default under sub-r. 1 of r. 82 or that he, the workman, is entitled to such compensation as he claims—namely, 30*s.* per week—for by the procedure already adopted that liability has been reduced in conformity with s. 12 to 11*s.* 1*d.* and no more. Thirdly, they say that the employers have followed the procedure of s. 12, and therefore execution ought not to be allowed, for s. 12 itself would be ignored, and the benefit of its cheaper procedure rendered of no effect. It is plain that those arguments are forcible. It would seem that the employers stand in a strong position where they have made use of the procedure open to them under sub-s. 3 of s. 12, and that procedure was safeguarded to them by the very terms of the agreement. We have therefore to consider what is the relation, if any, between s. 12 and the rights given to the workman under r. 82.

It has been stated in more than one case, and particularly by Cozens-Hardy M.R. in *Major* v. *South Kirkby, Featherstone and Hunsworth Collieries, Ld.* (1), that a workman who has a recorded agreement is in the position of a judgment creditor, and therefore that r. 82 is ancillary to that position, enabling the workman to put into execution his rights which the judgment he holds gives to him. On the other hand, s. 12 appears to give rights to the employer. It has been suggested that s. 12 does not apply in the case of recorded agreements.

(1) [1913] 2 K. B. 145, 150.

That point was left open in *Hayter's* case (1) and I find it unnecessary to decide the point at the present time. It is quite true that its opening words, "An employer shall not be entitled otherwise than in pursuance of an agreement or arbitration to end or diminish a weekly payment," seem wide words, and the rest of the section does not clearly indicate a distinction which would leave recorded agreements outside its ambit. But the point is a difficult one. I have stated it merely to make it quite clear that I do not deal with or decide the question. Looking, then, at s. 12, does the inchoate procedure taken by the employer, but not responded to by the workman, leave the employer with a conclusive order against the workman that the sum must be reduced in accordance with the certificate given to the employer? In my opinion no such effect can be attributed to the certificate obtained by the employer. The statute is quite clear in giving at times conclusive effect to a certificate, and where it does not do so I think it has not done so because the certificate or document is not conclusive. If the procedure of s. 12 is responded to by the workman and the matter goes forward to be determined by the certificate of a medical referee in pursuance of s. 19 of the Act, then that certificate of the medical referee under s. 19 is made by s. 19 conclusive evidence as to the matters so certified. But the fact that a certificate of the referee is conclusive appears to indicate that at the earlier stages before that conclusive stage is reached, there cannot be attributed to the certificate obtained by the employer or, indeed, the report obtained by the workman, a conclusiveness. That attribute is reserved to the certificate of the referee. That was what was in effect decided in *Pudney's* case. (2)

In *Pudney's* case (2), be it remembered, the workman was not in so strong a position as he is in the present case. There was in that case no recorded agreement, and yet it was held that although the workman was not in the position of a judgment creditor, it was still open to him, where inchoate proceedings had been taken under s. 12, to assert his rights

(1) Ante p. 274.

(2) [1925] 1 K. B. 346.

against the employer by means of the arbitration proceedings which he had initiated. Two points seem to be clear from *Pudney's* case. (1) The expression used in the case, "voluntary payment," was, I think, used to mark the antithesis between weekly payments paid under unrecorded agreements on the one hand, and sums ordered to be paid under an award, or paid under a recorded agreement, on the other. Those latter payments, that is, under an award or a recorded agreement, could be enforced by a rapid process, that is, under r. 82, as if they were due under a judgment. Next, I think *Pudney's* case (1) decided this, that s. 12 refers, in its earlier terms, to payments that can be ended under an award, and thus shows that the procedure under an arbitration remained available notwithstanding the existence of the exceptional procedure provided by s. 12. As I have said, I have left open the question of whether the procedure of s. 12 applies at all where there is a recorded agreement, and inasmuch as *Pudney's* case (1) has decided that even where the agreement is not recorded, there is a right in the workman to enforce his rights aliunde and not by the limited procedure of s. 12, it seems that a fortiori there is a right, and that right is still reserved to the workman where he is the holder of a recorded agreement. He has therefore a choice, a possibility, of proceeding under r. 82 or by arbitration. Sect. 12, it would therefore seem, is not so effective as it might at first sight seem to be. It is not conclusive in its earlier stages; conclusiveness can only be reached under the medical referee's decision and in respect of the matters covered by his certificate. But before that stage is reached under s. 12, the procedure under r. 82 is not excluded, as was held in *Pudney's* case. (1) Under r. 82 it appears to me that the difficulty suggested by Mr. Cave does not arise. It is quite true that the words "has made default" and "the party entitled," occur, but it must be remembered that this is a procedure initiated under r. 82 which contemplates and provides for a contrary view to that prima facie presented being considered. The application

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(1) [1925] 1 K. B. 346.

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is to be made first to the Registrar, before whom cause may be shown to the contrary—namely, that the party claiming to be entitled is not entitled, that the party claiming that default has been made is not justified in alleging default, and where the contrary is thus shown, then it is the duty of the Registrar to send the matter to the judge. When it comes before the judge he has the power to " make such order or give such directions as may be just." Those are wide words, and are intended to give him a wide discretion. Sub-r. 5 commences with the two words, " in particular," and indicates that the employer may be given the opportunity of asking for a review under s. 11. In my view, however, sub-r. 5, with its particular reference to a review, does not cut down the general powers of the judge under sub-r. 4. I should be sorry to set any definite limitation to the judge's power under sub-r. 4, and I think it far better not to do so. His power is wide, and he has the powers given him in sub-r. 5, but that sub-rule does not shut out a discretion to be exercised in another and different way from that provided by sub-r. 5.

Hayter's case (1), to my mind, covers the point. The effect of this decision, as of *Hayter's* case (1), is to prevent s. 12 giving final rights to an employer who proceeds under sub-s. 3 if the full procedure of the section is not carried out. It must, however, be remembered that s. 12 was passed to prevent the employers stopping payment, as had been done previously, except in certain specified cases. It was a section passed to secure the continuance of payments in favour of the workman, and therefore its purpose may still be fulfilled, even though it leaves to the workman the power to proceed, as *Pudney's* case (2) decided, under an arbitration or, as we decided in *Hayter's* case (1) and in the present case, under r. 82.

It appears to me for those reasons that the order made by the judge was right, and there will be time given for the employers to request an arbitration in regard to a review. The procedure under r. 82 must be suspended until the order of the learned judge, which brings into play sub-r. 5, has been carried out. If a direction as to that is needed, it can be given when my learned brothers have concluded their judgments.

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(1) Ante p. 274.

(2) [1925] 1 K. B. 346.

LAWRENCE L.J. I agree, and have only very few words to add to the judgment delivered by the Master of the Rolls.

In my opinion this case is indistinguishable from *Hayter's* case (1), the decision in which governs the decision in the present case. Mr. Cave sought to distinguish *Hayter's* case (1) from the present case on the ground that, in the former, the point was not taken that after the service by the employers of the copy of the certificate of the medical practitioner under sub-s. 3 of s. 12 and in the absence of any counter-notice by the workman, the employers were no longer liable to pay the full amount of the compensation mentioned in the recorded agreement, and consequently that they had not made default in payment of that amount, and that the workman was not entitled to that amount, within the meaning of r. 82. It is true that this point was not specially mentioned in the judgments delivered in *Hayter's* case (1), but in my opinion it is plain that the judgment of the Court in that case covered the point. The facts in *Hayter's* case (1) were, for all practical purposes, identical with the facts in the present case, and it is evident that the Court there considered that, for the purposes of r. 82, the employers had remained liable and had made default, notwithstanding that they had initiated proceedings under s. 12 and that the initiation of those proceedings did not constitute a bar to an application by the workman for leave to issue execution under r. 82. For these reasons I think that the appeal should be dismissed.

SLESSER L.J. I agree, and as, in my opinion, *Hayter* v. *Southern Railway* (1) has decided, so far as this Court is concerned, that proceedings started by an employer under s. 12 do not (at any rate if there be no counter-notice and no reference to the medical referee and the final certificate) preclude the workman from taking advantage of r. 82 of the Workmen's Compensation Rules in order to obtain execution if he can, it is unnecessary to deal again with the

(1) Ante p. 274.

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arguments on that head. But Mr. Cave appears to me to have put the matter in argument in another way as well, and I think, in deference to his further argument, that I will say a few words upon that point. As I understand Mr. Cave, he says this: he points out that, under sub-r. 1 of r. 82 it is provided that where a party liable to pay compensation under any memorandum or award, has made default in payment of the amount awarded, the party entitled to compensation may apply to the Court for leave to issue execution against the party in default. He says that here, in so far as the workman has not given a counter-notice under s. 12 and therefore the report of the medical practitioner stands that he is no longer incapacitated, it cannot be said that the employers are in default. I think, in substance, that that point, although not expressly so argued, was decided in *Hayter's* case. (1) There also there had similarly been a report, although no direct reference is made to this particular argument based upon the word "default." But when we come to examine r. 82, we see that the word "default" in sub-r. 1 must be read together with the subsequent sub-rules. Sub-r. 4 contemplates that cause to the contrary may be shown, that the leave to issue execution shall not be given, and, as my Lord has pointed out, upon that the judge may make such order or give such directions as may be just. That being so, therefore cause may be shown to the contrary after an allegation has been already made that the employer is in default with his payments. Then sub-r. 5 deals specifically with the power to deal with the request for arbitration for review of the weekly payment. I think, in the light of the fact that there is power to consider whether the employer is or is not entitled to cease payment notwithstanding the fact that there is a recorded agreement, one must give a liberal construction to the word "default" in sub-r. 1, because the question has then to be argued, when the employer has ceased to pay, whether he is or is not entitled to cease to pay. A short examination of the history of this rule fortifies that view.

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(1) Ante p. 274.

As is shown by *Ibrahim Said* v. *J. H. Welsford & Co.* (1) under the Workmen's Compensation Rules of 1907, what are now sub-rr. 4 and 5 were non-existent, and all you had at that time was sub-r. 1 to the following effect: "Where a party liable to pay such compensation or costs under any award, memorandum or certificate has made default in payment of the amount awarded, or where payment is to be made by instalments, of any instalment, execution may issue against his goods without leave for the amount in payment of which he has made default." It was held by the county court judge that the word "default" there had such a meaning that the employer could not, when he had failed to make his payments, tender evidence to show that in fact the workman was no longer incapacitated, because the agreement was that he should pay during the time of incapacity. The Court of Appeal held that that was wrong. Cozens-Hardy M.R. said (2): "The learned county court judge declined to hear evidence as to whether the incapacity had or had not ceased. I do not pause to ask on which side the onus of proof might be because that is not in issue here; but I am quite clear that a judgment in this form does not entitle the plaintiff to obtain execution unless he proves default, and if he is bound to prove default, the other side ought certainly to have a right to be heard." After that judgment there was added to the rule, which was then r. 67 and subsequently became r. 82, the particular machinery of sub-rr. 4 and 5, sub-r. 4, as my Lord has pointed out, in general terms giving the judge power to make such directions as he may think just and fair, specifically giving the power to order a review. But the observations of Cozens-Hardy M.R. in *Ibrahim Said's* case (2) on the general effect of the obligation that there is to show that there is default, still seem to stand. He appears to treat the word "default" in the first place as meaning that there has been a non-payment, but that subsequently, in order for the workman to continue his right to get the payment, the Court has to be satisfied that the incapacity continues, though he leaves expressly open the question of on whom the onus lies.

(1) (1910) 3 B. W. C. C. 233.

(2) (1910) 3 B. W. C. C. 238.

Machinery to that effect is now provided in sub-r. 5, and therefore the result, as I see it, is this, that the employer does make default in the first instance under sub-r. 1 when he ceases to pay, but that does not prejudice his right to show cause that a direction should be made under sub-r. 4 or that a review should be made under r. 5. That is why, as I understand it, both in *Hayter's* case (1) and in this case, the argument on the exclusive effect of s. 12 having failed, the Court of Appeal in that case and the learned judge in this case have nevertheless preserved to the employer the rights which he ought to have under sub-rr. 4 and 5 to show that the workman has in fact recovered, and get directions or obtain a review, as may be the case. Therefore I think that Mr. Cave's point that the workman, so to speak, fails in limine by not showing that there is default, fails. I think that " default " in sub-r. 1 means no more than failure to pay, though later on in the later part it is contemplated that an actual default, when the issue is being considered, can only arise when there is incapacity or the terms of the agreement are not complied with.

Finally, I would quote a passage on that head from Bowen L.J. in *In re Young and Harston's Contract* (2), where he says: " Default is a purely relative term, just like negligence. It means nothing more, nothing less, than not doing what is reasonable under the circumstances." Here, therefore, under the circumstances, if the man is in fact incapacitated, it is the duty of the employer to continue to pay. If he is not incapacitated, then the section, in the interest of the employer, contemplates that the workman will proceed to apply for execution, that the employer will show cause to the contrary, and then that the matter will come, in the first place before the Registrar, and then if necessary before the judge for a proper order to be made under sub-rr. 4 and 5 of r. 82.

Appeal dismissed.

Solicitor for appellants: *Alexander Eddy.*

Solicitors for respondent: *Scott Duckers & Co.*

(1) Ante p. 274.

(2) (1885) 31 Ch. D. 168, 174.

W. I. C.

NEWMAN MANUFACTURING COMPANY *v.* MARRABLE.

1930
Dec. 16, 17.

Customs—Duty on Buttons—" Buttons . . . . whether finished or unfinished" —Button Blank of Trocas Shell pierced with one Hole—Whether an "unfinished" Button—Safeguarding Statute—Canon of Construction—Finance Act, 1928 (18 *&* 19 *Geo.* 5, *c.* 17), *s.* 9, *sub-ss.* 1, 3.

By s. 9, sub-s. 1, of the Finance Act, 1928, a customs duty is imposed on buttons imported into the United Kingdom. By sub-s. 3 in this section the expression " buttons " means buttons made of any material, and whether finished or unfinished, of a description commonly used for the fastening or decorating of wearing apparel or household linen, not being buttons forming part of any other article.

Beads or button blanks, nearly spherical in shape, made of trocas shell and perforated by one hole were imported into the United Kingdom, After grading them the importers made or completed the making of them into shoe-buttons in the United Kingdom, by the insertion of shanks by means of a machine into and through the holes, and then sorting, cleaning, dyeing, repolishing and resorting them for shade. The cost of the shanking was one-seventh of the total cost of the completed article; material, labour and a proportion of overheads:—

Held, following *Powell Lane Manufacturing Co.* v. *Putnam* (1), that in deciding what is the meaning of the expression " unfinished " button in sub-s. 3, the Court should consider the object of the section, which is to protect the English button trade. The statute was directed against those who imported goods, which were not quite buttons, but upon which the bulk of the work had been done abroad, very little remaining to be done by the manufacturers in the United Kingdom. The bead or button blank was an " unfinished " button within the meaning of sub-s. 3.

BEFORE the year 1928 Messrs. Appleby & Newman of New York exported boot and shoe buttons into the United Kingdom. In March, 1929, the Newman Manufacturing Company, Ld., the plaintiffs, were incorporated in England and manufactured and/or finished buttons for boots and shoes in the United Kingdom.

The defendant was a customs officer, who on July 25, 1930, had required the plaintiffs to pay 19*l.* 18*s.* 10*d.* duty under s. 9 of the Finance Act, 1928 (2) on cases of articles

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(1) Unreported. Decision of the Court of Appeal, May 16, 1928. See note at the end of this report.

(2) By s. 9, sub-s. 1, of the Finance Act, 1928: " During a period of five years beginning on the twenty-eighth day of April, nineteen hundred and twenty-eight, a customs duty of an amount equal to thirty-three and one-third per cent. of the value of the goods shall be payable on buttons imported into the United Kingdom.

(3.) In this section the expression 'buttons' means buttons made of imported on a Japanese steamship the *Asuta Maru*, and described by the consignor in America in the bill of lading as "buttons," and described by the plaintiffs as consignees under the heading: "Entry for free goods," as "shoe button blanks (for shoe manufacturing purposes)," The plaintiffs paid the duty claimed under protest.

The plaintiffs now by this action brought under ss. 30 and 31 of the Customs Consolidation Act, 1876, sought a declaration that the articles, which they described as beads (hereinafter known as "button blanks"), were not dutiable under s. 9 of the Finance Act, 1928, and they claimed a return of the sum paid as duty to H.M. Customs of 19*l.* 18*s.* 10*d.*

From the evidence called for the plaintiffs it appeared that the article imported, a button blank, was a bead made of trocas shell, almost spherical, and perforated by a single hole through its centre. In this country these button blanks were first graded by a machine for thickness. A German silver rivet with a head, like a pin-head, was then by means of a shanking machine passed through the hole in the button blank, and the end twisted round, to form a loop, for the purpose of its attachment to a boot or shoe. The button blanks were then sorted by hand, cleaned, dyed, repolished and then resorted for shade. The finished, manufactured article was then packed for sale to boot and shoe manufacturers. The wastage in these processes was 7 per cent. The cost of the shanking was about one-seventh of the total cost of the completed article: material, labour and a proportion of overheads.

Mr. Edgar John Murray, a director in H. T. Greenlaw & Co., Ld., manufacturers of shirts, pyjamas and dress waistcoats, in giving evidence for the plaintiffs, said that the

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any material, and whether finished or unfinished, of a description commonly used for the fastening or decorating of wearing apparel or household linen, not being buttons forming part of any other article ....

(4.) Sub-sects. 2, 3 and 4 of s. 1 of the Safeguarding of Industries (Customs Duties) Act, 1925, shall apply to the goods chargeable with duty under this section and to the duties imposed by this section as they apply to the goods chargeable with duty under that Act and to the duties imposed by that Act."

button blanks were not capable of being used as buttons for fastening or decoration; to be used as a button, finished or unfinished, a shank would have to be fitted to the button blank. The button blank was part of the material of a button. Mr. James Llewellyn Davies, managing director of Messrs. Russell & Allen, Ld., costumiers and furriers, called for the plaintiffs said that the button blanks were known to the trade as rondals or rondal beads; they were mostly used for necklaces, being placed in between two large beads. They could not be used as buttons without a shank, as they had only one hole. A rondal could be manipulated into a button. Mr. Percival Alfred Ward, a shoe manufacturer, called by the plaintiffs, described the button blanks as parts of buttons.

For the defendant, Mr. George Francis Cope, sole proprietor of Messrs. G. E. Cope & Sons; Mr. Richard Henry Clarkson, managing director of Clarkson & Sons, Ld.; and Mr. Walter Thomas Checkley, manager of the Pearl Department of Messrs. Buttons, Ld., all manufacturers of pearl buttons, described the button blanks as unfinished boot or shoe buttons. Mr. Cope said that Messrs. G. E. Cope & Sons made the same kind of boot and shoe button throughout in this country. In 1928 the general practice of the trade was to dye and polish the button before shanking, which was the last process employed. Before the imposition of this duty in 1928 he had never heard of the importation of these button blanks without their shanks.

N. L. C. Macaskie K.C. and *P. B. Morle* for the plaintiffs. These beads are not buttons, either finished or unfinished. As they are, they cannot be sewn on to any material as buttons, as they have only one hole, and the cotton would pass round the exterior of the bead and so prevent its use as a button for attachment. So also such an article, if used for decorating wearing apparel, would be a bead and not a button, and it would not be so used with the sewing material passing outside the bead. Some statutes impose a duty on an article and its component parts, but that is not the case here. To attach duty the article must be a button. An unfinished button is a button which requires either a process of turning or polishing or dyeing or some similar process, not an article which requires the addition of a substantial part, involving an alteration in the original article. By s. 10 of the Merchandise Marks Act, 1926 (16 & 17 Geo. 5, c. 53): "For the purposes of this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say, ... 'Imported goods' does not include—(*a*) goods which since the date of their importation have undergone in the United Kingdom any treatment or process resulting in a substantial change in the goods. . . . ." These beads would not be imported goods for the purposes of the Merchandise Marks Act, 1926, as since the date of their importation they undergo in the United Kingdom a process resulting in a substantial change in the goods. In the case of the old wooden skate, the blade, apart from the wooden platform, could not be described as a skate, either finished or unfinished: it is the component part of a skate.

In the Oxford English Dictionary (1888 edition) the meaning of "button" under the heading "generally" is given as: "Button: a small knob or stud attached to any object for use or ornament." Then in the first paragraph: "A knob or stud of metal or other material sewn by a shank or neck to articles of dress, usually for the purpose of fastening one part of the dress to another by passing through a *button-hole*, but often merely for ornament: in process of use, the name has passed from the connotation of the shape to that of the purpose, and been extended to all appliances of the kind, a common type being a disc, quite flat, or slightly convex or concave, of metal, bone, glass, mother of pearl, paste, etc., perforated or otherwise adapted to be sewn on by its central part. (This specific application is now regarded as the primary sense, all the other meanings, whatever their historical origin, being understood as merely *transf.*") A button blank is described as: "A disc of metal, bone, or other material to be formed into a button."

Hon. Sir Stafford Cripps S.-G. (*Sir William Jowitt A.-G.* and *W. Bowstead* with him) for the defendant. Some meaning has to be given to the word "unfinished" in sub-s. 3 of s. 9 of the Finance Act, 1928: "buttons made of any material, and whether finished or unfinished." Regard must be had to the object of this section of the Finance Act, 1928. It was a "safeguarding" section passed to safeguard industries in this country. In sub-s. 4 of s. 9 there is a reference to certain sub-sections of the Safeguarding of Industries Act, 1925, which are applied. Safeguarding of two British industries is the main purpose of this section.

A similar section which did not contain the word "unfinished" was before the Court of Appeal on May 16, 1928, in *Powell Lane Manufacturing Co., Ld.* v. *Putnam.* (1) In that case the question at issue was whether a certain kind of strawboard imported into the United Kingdom came within the description "packing or wrapping paper," in s. 11, sub-s. 1, of the Finance Act, 1926. Scrutton L.J. said: "The appellants" (the subject) "have said: 'At any rate this is ambiguous; Parliament has not made clear what it meant, and in a taxing Act the tax must be clearly imposed for the subject to be liable, and if ambiguous words are used, the presumption is in favour of the subject.' That rule of construction is undoubtedly laid down in very many cases, so many that I need not trouble to cite them. On the other hand, questions do arise from time to time as to how we are to construe language used in a taxing Act, which is, at the time that you seek to apply it, not so applicable perhaps as it was at the time the Act was passed. A case of the class of which I am thinking is the well known case relating to Teignmouth bridge, for which a toll was imposed in the fifth year of George IV.: 'For every coach, chariot, hearse, chaise, berlin, landau and phaeton, gig, whiskey, car, chair or coburg and for every other carriage hung on springs,' and in 1901 there came along the bicycle. The question was whether those taxing words included a bicycle—whether it was a 'carriage hung on springs.'

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(1) Unreported. See the note at the end of this report.

Lord Halsbury, in agreeing that the bicycle did not come within the words of the Act, said in *Simpson* v. *Teignmouth and Shaldon Bridge Co.* (1): 'The broad principle of construction put shortly must be this: What would, in an ordinary sense, be considered to be a carriage (by whatever specific name it might be called) in the contemplation of the Legislature at the time the Act was passed? If the thing so sought to be brought within the Act would substantially correspond to what the Legislature meant by a carriage (called by whatever name you please), I think that the tax would apply; but if not, it is not for the Court to make an effort by ingenious subtleties to bring within the grasp of the tax something which was not intended in substance by the Legislature at that time to be the subject of taxation.' Now applying that rule of construction to this case, I think the Legislature, in passing this s. 11, intended 'packing or wrapping paper,' by whatever name it was called, to be the subject of a tax, because it was to be in competition with an English product, which, according to the evidence, was used for packing and wrapping paper, and, to use Lord Halsbury's words, anything that would substantially correspond to what the Legislature meant by packing or wrapping paper would come within the tax."

Applying that principle here, it is clear that Parliament desired to provide protection for employment in the button making industry in the United Kingdom. Buttons finished and unfinished were protected, and in construing the word "unfinished" in the sub-section the object of the Legislature should be considered. The cost of shanking is but one-seventh of the total cost. It is submitted that bearing in mind the object of Parliament the words "finished" and "unfinished" in sub-s. 3 must be interpreted by the amount of work that has been employed upon the article, when it is imported.

In *Squire* v. *Stanley Brothers* (2) it was held that where girls were employed in a process in which bricks were dipped in a material and ultimately fired to give them a glazed

(1) [1903] 1 K. B. 405, 413.

(2) [1901] 84 L .T. 535.

surface, this was a "finishing" process within the meaning of Sch. I. to the Factory and Workshop Act, 1878. The process there considered was one which fundamentally altered the article. Once the material of a button has assumed its final shape and configuration and can with the addition of a shank be at once used for a button, it is a button, though, no doubt, an unfinished button, within the meaning of that word in a statute of this kind to protect British manufacture. It cannot be that the time when the blank becomes a button depends upon the time when the shank is added to it. The word "unfinished" in this sub-section has no technical meaning; it merely means so substantially manufactured as to come within what is aimed at by the section.

N. L. C. Macaskie K.C. in reply. I desire to adopt the test of the learned Solicitor-General as to what is an "unfinished button." Has the article assumed its final shape and configuration? These beads had not done so when they were imported, and did not do so until the shanks were added, when they became unfinished buttons. In the six-sevenths of the cost of the button a large part is material—the bead and the rivet. Of the cost of labour much is incurred after the shanking. The test is this: Is this bead an article which for the purposes of commerce could be put to any of the uses of a button? The answer is in the negative; it cannot be so used without a shank. In *Squire* v. *Stanley Brothers* (1) the brick was still a brick in all essentials before it was glazed. It is submitted that Parliament did not intend to make dutiable the raw materials of which buttons are made.

HORRIDGE J. The articles which were imported in this case and which are called by the plaintiffs "beads," and by the defendant "unfinished buttons," have got a hole in their centre. It is, I think, clear on the evidence that they could not be used as they are as buttons without the addition of some sort of shank. It is unquestionable that they were imported

(1) (1901) 84 L. T. 535.

for the purpose of having shanks attached to them, and being made into complete buttons.

Sub-s. 3 of s. 9 of the Finance Act, 1928, is in these words: "In this section the expression 'buttons' means buttons made of any material, and whether finished or unfinished, of a description commonly used for the fastening or decorating of wearing material or household linen. . . ." It is said on behalf of the plaintiffs that these articles were not buttons at all, and that therefore they were neither finished nor unfinished buttons. It seems to me that there is a fallacy in that contention, because, if they were buttons at all, there would be no occasion for the word "unfinished," and some meaning must be given to the word "unfinished." If they were buttons they were within this taxing section—s. 9 of the Finance Act, 1928—even though they were not finished at all. My task, then, is to ascertain what is the meaning of the word "unfinished" in sub-s. 3.

In my opinion some assistance is given to me by the case to which I have been referred, of *Powell Lane Manufacturing Co.* v. *Putnam.* (1) In the light of the judgments in that case I think that I ought to look at the object of this section. I think it was intended to protect the English button trade. To protect that trade against the importation of completed buttons it would only be necessary for the definition and the sub-section to use the word "buttons." But in my view the statute was directed against those who imported goods which were not quite buttons, but upon which the bulk of the work had been done abroad, and very little remained to be done by the manufacturer in England. I think that was the reason why the words "buttons . . . . whether finished or unfinished" were used in this section.

In my judgment these articles were unfinished buttons; they were going to be buttons, and they were going to have a shank put into them. The insertion of that shank only involved one-seventh of the total cost of the finished button. This article with a hole ready to have a shank put into it was an unfinished button within the meaning of s. 9 of the

(1) Unreported. See the note at the end of this report.

Finance Act, 1928. I think therefore that these articles were dutiable under the section, and that my judgment must be for the defendant.

Judgment for the defendant.

Solicitors for the plaintiffs: *James, Mellor & Coleman, for Phipps & Troup, Northampton.*

Solicitor for the defendant: *Solicitor of Customs and Excise.*

T. W. M.

NOTE.

In *Powell Lane Manufacturing Co., Ld.* v. *Putnam* (unreported) the question at issue was whether a species of straw board or straw paper (2½ oz.), imported from Holland into the United Kingdom, was dutiable as being paper of the description known as "packing or wrapping paper" within the meaning of those words in s. 11, sub-s. 1, of the Finance Act, 1926.

The Court of Appeal delivered the following judgments on May 16, 1928:—

SCRUTTON L.J. I confess that I have some sympathy with the appellants in this case, because this matter was not discussed by the committee to whom the question of a protective or safeguarding tax on imported paper was referred. I cannot find any trace in their report that they considered at all the purposes for which straw board or straw paper of different weights was imported from Holland or the purposes for which it was used in this country. If the Board of Trade appreciated that the words used in sub-s. 1 of s. 11 would cover straw board or straw paper, I regret that they did not ask for a report from the committee upon the question of straw board or straw paper. I do not know all the facts, and it may be that each side intentionally refrained from mentioning the subject of straw board or straw paper in their evidence before the committee, for each may have thought they would do better if it were not mentioned. That may be so; but I confess I regret that the Board of Trade should have put forward, as I suppose they have, a wording which, in their view, covered straw board and straw paper, when the matter had not been considered by the committee that they had asked to report to them.

The question which we have to consider is, whether this Dutch import comes within the language of s. 11 of the Finance Act, 1926. It appears that the inhabitants of Holland, which is well known as a commercial country of great organization and ability, have invented a system by which the farmers get rid of their waste product of straw by becoming shareholders in paper mills to which they send their straw, relying for remuneration for it on their dividends as shareholders in the paper mills, and a substance is made by these Dutch mills from straw provided by the Dutch farmers, a substance which ranges in thickness and weight from a board, a specimen of which was shown to us, and the standard size of which is said to be of a weight of 4 lb., to a thin piece of substance, of the same size, which is said to be only 1 oz. in weight. The question which is in controversy in this case is whether this kind of substance, when it is of a thickness which gives 2½ oz. to the same size—that is to say, heavier than the 1 oz. and very much lighter than the 4 lb.—comes or does not come within the wording of this sub-section. It further appears that in England the farmers, not yet having organized themselves to send their straw to mills, there are paper mills which make this material, this straw board or straw paper, out of the waste of the Dutch papers mixed up with other waste products, which is all reduced to a pulp, and produce something which can be described as straw paper or straw board, though it is one further remove from the straw than is the Dutch product, which comes direct from the straw. It further appears on the evidence, I think, that the English product is used for packing and wrapping direct, but that the Dutch product, on its importation, is mainly used to enable English manufacturers to make corrugated paper out of it. Two, three, four or more folds of the Dutch product are glued together and corrugated, and on the pleasant arrival of a medicine bottle it appears wrapped or packed in this corrugated paper in order to protect the glass from being broken.

That being the subject matter of the dispute, Parliament in the Finance Act, 1926, imposed this duty. It was not imposed under the Safeguarding of Industries Act, 1921; it could not, I think, have been imposed under that Act, which permitted a duty to be imposed either when the foreign manufacturer was assisted by depreciation of the currency, or in the case of the foreign manufacturer "dumping" goods in England at a price below his cost of production, and it is not suggested that either of these conditions existed in the case of Holland. Therefore under the Safeguarding of Industries Act, 1921, this duty could not have been imposed. But since that Act has expired, the Board of Trade has gone on safeguarding or protecting by obtaining the report of a committee, considering imports and then introducing a clause directly into a Finance Act, which imposes the duty. As I have said, it is unfortunate that in this case the committee appointed by the Board of Trade do not seem to have considered at all the position of this product which came from Holland. They seem to have directed their attention to the conditions under which wood pulp papers and others were produced in the Scandinavian countries, and not to have appreciated that any question was involved of this Dutch product. That was the origin of this section, which provides that: "A duty of customs . . . . shall be charged, levied and paid, on the importation into Great Britain or Northern Ireland of the following goods, that is to say—paper, whether in sheets or rolls or otherwise.' These words can be relegated to future discussion; they only relate to the form in which the paper is imported. The sub-section continues: "Of any description known as packing or wrapping paper. . . ." I do not know why the words "packing or wrapping paper" alone were not used, unless it was for the purpose of providing employment for a deserving profession in this case. The words are: "Paper . . . . of any description known as packing or wrapping paper." The argument put forward for the appellants is that at the time the Finance Act, 1926, was passed, no one called this Dutch product "packing or wrapping paper." It was invoiced and imported under the name of straw board, and sometimes, of straw paper; but no one called it "packing or wrapping paper"; and they say that, with the exception of a very small quantity of the 1 oz. quality, none of it imported into England was used directly for packing or wrapping paper, but it was used by English manufacturers to make into corrugated paper. The appellants contend that the words "of any description known as" in the sub-section means "talked of in the trade as," and they say that this product was not so talked of in the trade as packing or wrapping paper, but that it was talked of or described in the invoices as straw board or straw paper. Then the Crown contend that the correct way to construe the sub-section is that it refers to paper of any kind, the word "description" meaning not "named" but of any kind, known to be commercially used as packing or wrapping paper; and if a paper is known to be commercially used as that, it does not matter by what name it is called, so long as it is generally known that that is the way in which it is used.

The appellants have said: "At any rate this is ambiguous; Parliament has not made clear what it meant, and in a taxing Act the tax must be clearly imposed for the subject to be liable, and if ambiguous words are used the presumption is in favour of the subject." That rule of construction is undoubtedly laid down in very many cases, so many that I need not trouble to cite them. On the other hand, questions do arise from time to time as to how we are to construe language used in a taxing Act, which is, at the time that you seek to apply it, not so applicable perhaps as it was at the time the Act was passed. A case of the class of which I am thinking is the well known case relating to Teignmouth Bridge, for which a toll was imposed in the fifth year of George IV.: "For every coach, chariot, hearse, chaise, berlin, landau and phaeton, gig, whiskey, car, chair or coburg, and for every other carriage hung on springs," and in 1901 there came along the bicycle. The question was whether those taxing words included a bicycle—whether it was a "carriage hung on springs." Lord Halsbury, in agreeing that the bicycle did not come within the words of the Act, said in *Simpson* v. *Teignmouth and Shaldon Bridge Co.* (1): "The broad principle of construction put shortly must be this: What would, in an ordinary sense, be considered to be a carriage (by whatever specific name it might be called) in the contemplation of the Legislature at the time the Act was passed? If the thing so sought to be brought within the Act would substantially correspond to what the Legislature meant by a carriage (called by whatever name you please), I think that the tax would apply; but if not, it is not for the Court to make an effort by ingenious subtleties to bring within the grasp of the tax something which was not intended in substance by the Legislature at that time to be the subject of taxation."

Now applying that rule of construction to this case, I think the Legislature, in passing this s. 11, intended "packing or wrapping paper," by whatever name it was called, to be the subject of a tax, because it was to be in competition with an English product which, according to the evidence, was used for packing and wrapping paper, and, to use Lord Halsbury's words, anything that would substantially correspond to what the Legislature meant by packing or wrapping paper would come within the tax.

The evidence about this particular sort of paper is this. First of all the appellants admit that it is paper. Is it packing or wrapping paper? There is evidence that some thickness of it, the 1 oz., is used in packing or wrapping photographic plates. There is evidence that some thickness of it is used in packing or wrapping tin plates to keep them separate from each other. There is evidence that some of it is used in packing or wrapping bundles of toilet paper packed together in bundles of half a dozen or so. There is evidence that this imported paper is, on the continent, used for packing and wrapping, and there is evidence, which I am bound to say impressed me, that the only purpose apparently for which this paper is imported into this country is that it may be fastened together in sheets, and used for packing and wrapping, when corrugated.

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(1) [1903] 1 K. B. 405, 413.

That being the evidence, it appears to me that I cannot interfere with the finding of the learned judge, who, as I understand it, found that at the time this Act was passed this paper was known to be commercially used for packing and wrapping. If that is so, it appears to me to come within the wording of the Act, applying the principle of construction stated by Lord Halsbury in *Simpson* v. *Teignmouth and Shaldon Bridge Co.* (1), and, therefore, though, as I say, I regret that the matter was not brought before the committee, which advised the Board of Trade, and that the Board of Trade did not see that it was brought before the committee, I cannot interfere with the view taken by the learned judge below. The appeal must be dismissed.

LAWRENCE L.J. I agree. The article which it is sought to bring within the scope of s. 11 of the Finance Act, 1926, consists of what is known as straw paper. In the Court below there was a controversy for some time whether it was straw paper or straw board. I gather that the Attorney-General admits that if it was straw board prima facie it would not come within the definition of "paper" in s. 11. But after evidence had been given by witnesses tending to show that up to the 4 oz. weight the trade looked upon this product as paper, being straw paper, and that only when the rigidity of the paper was increased by a weight greater than 4 oz., was it called straw board—when that evidence had been given—counsel for the subject, I think, very properly, admitted that this quality, that is to say the 2½ oz. quality, was paper.

Therefore we start with this: that it is paper of some description. Now it is urged by the appellants that it is, although paper, not a paper which is known as packing or wrapping paper. What are the facts as proved? Before the "'eighties" straw paper, both of light and of heavier weight, was imported into this country solely for the purpose of wrapping or packing in its original state. Then it occurred to a manufacturer that the 2½ oz. paper, or paper thicker than that up to the 4 oz. paper, would serve its purpose better if it were manipulated and were corrugated, and, after that, although the lighter paper was still imported and used as wrapping or packing paper, without being manipulated, 2½ oz. paper and other heavier papers were corrugated before they were used for packing or wrapping. So far as I gather, there was only a small extent to which the 2½ oz. paper was used for packing in this country, if there is any evidence that it was so used. There is evidence to show that the 2½ oz. paper, without being corrugated, is still used abroad for packing, and it comes into this country, as I gather, as packing paper in use with imported articles. But what is quite clear to my mind is that the use of the paper in this country has been, and is now, only that of packing and wrapping paper. There is no other purpose for which it is used, nor was there any suggestion made by counsel that it could be used for any other purpose.

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(1) [1903] 1 K. B. 405, 413.

I ask myself: Is this, on that evidence, paper of a description known as packing or wrapping paper? It seems to me in construing that phrase we ought to have regard to the passage quoted by Scrutton L.J. from Lord Halsbury's judgment in *Simpson's* case (1); and I would only like to supplement that by the quotation of another passage from the same judgment, which is to the same effect (2), where he says: "The truth is that, when you are dealing with a question of this sort and endeavouring to find out whether a thing is taxable or not under Acts of this character, the first thing to do is to find out whether there is anything which corresponds in the ordinary and natural course of meaning to the language which the Legislature at the particular time used in making the things mentioned in such Acts the subject of taxation. I do not think it is a question merely of words whether the thing sought to be made taxable was called a coach or not, if it was intended to fill the functions of a carriage according to the description given in the original Act. I quite agree that the mere fact that it was called by a different name from those enumerated in the Act would not matter, because the language would have been used by the Legislature in a sense which everybody could understand, and which would comprehend the particular thing although it might be called by another name."

It would seem to me extraordinary to accede to the request of the appellants if it led to this, that any paper which had not been known to be used in England as packing or wrapping paper, although its use could only be that of packing or wrapping, were allowed to compete with the English paper manufacturer, who makes wrapping or packing paper, solely because the composition of that paper was somewhat different from what it had hitherto been. It seems to me that the true meaning of the section is that it taxes paper of any kind, which can be or is properly brought under the genus of packing or wrapping papers; and that being so, which, I think, is in substance what my Lord, and the learned judge in the Court below, have held to be the true construction, it follows that this appeal fails and must be dismissed.

GREER L.J. I agree. The appeal here is really upon a question of fact, which has been dealt with by the learned judge below in favour of the taxing authority. There is no distinction between the construction which the appellants ask us to put upon s. 11 of the Finance Act, 1926, and the construction that the Attorney-General asks us to put upon it. The words mean that a tax is put upon paper known as packing or wrapping paper. The question the learned judge had to decide was whether, upon the evidence before him, it was right for him to draw the inference of fact that this 2½ oz. Dutch paper was known as packing or wrapping paper? I agree that that means known in the trade as paper for use as a packing or wrapping paper. For my own part, having looked at the paper, and knowing, as we have learnt, that it is not used for any other purpose except for the purpose of being manipulated into suitable packing material, I do not see how the learned judge could have come to any other conclusion than that it must be known as packing or wrapping paper. It could not be known as anything else.

I think the judgment was quite right, and I agree that this appeal should be dismissed.

(1) [1903] 1 K. B. 405.

(2) [1903] 1 K. B. 405, 411.

1931
March 25, 26.

MARTIN *v.* PERRY AND DAW.

[1930. M. 2864.]

Principal and Agent—Estate Agent—Commission—Sale of Business—Commission payable "on a sale being effected"—Agreement to purchase entered into—Non-completion.

The plaintiff put his business in the hands of the defendants, estate agents, to find a purchaser, commission being payable "on a sale being effected." The defendants found a purchaser R., who paid a deposit to the defendants as agents for the plaintiff, and entered into a binding contract with the plaintiff to purchase the business. For reasons, of which no evidence was given by the defendants, R. did not complete. The plaintiff thereupon claimed the above deposit from the defendants. The defendants admitted the claim, but counterclaimed a larger sum as commission:—

Held, that the defendants, to be entitled to commission, were bound to introduce a purchaser ready, willing and able to complete; that the onus of showing that R. was such a purchaser lay on them, and that they had failed to discharge that onus, and were consequently not entitled to commission.

ACTION tried by Charles J. without a jury.

The plaintiff Arthur Martin, trading as Head Brothers, tobacconist, of Tram Terminus, Streatham High Road and other places, claimed from the defendants Messrs. E. W. Perry & Daw, estate agents, 21 Liverpool Street, E.C., the sum of 120*l.*, money received by the defendants to the use of the plaintiff, being the amount of a deposit paid by Mr. H. T. Robinson on the proposed purchase by him of the plaintiff's businesses as tobacconist, which had been placed in the defendants' hands by the plaintiff in order that they should find a purchaser. The defendants admitted the claim, but counterclaimed 135*l.*, which they alleged was due to them as commission on the sale of the businesses. The plaintiff verbally instructed the defendants as his agents to find a purchaser, and produced a letter from the defendants to him dated February 18, 1929, confirming the verbal arrangement, in which they said: "Referring to our interview to-day we write to confirm that . . . . on a sale being effected you are prepared to allow us a commission." In February, 1929, the defendants introduced a Mr. H. T. Robinson as purchaser, and in March, 1929, a written agreement to purchase the businesses, etc., was entered into between the plaintiff and Robinson. The agreement provided for the payment of a deposit of 120*l.* (which was duly paid by Robinson to the defendants as agents of the plaintiff), and by clause 8 set out that, "The purchaser is at liberty to assign this contract to a company and is then released from further liability under this contract." Eventually Mr. Robinson did not complete the purchase, no evidence of the reason of the non-completion being given at the hearing. Thereupon the plaintiff claimed from the defendants the amount of the deposit, the writ being issued on August 8, 1930. The defendants, while admitting the plaintiff's claim, counterclaimed 135*l.*, the amount of the commission they alleged to be due to them.

The plaintiff contended that in these circumstances no commission was payable to the defendants.

Casswell for the plaintiff. The claim being admitted it is for the defendants to prove their counterclaim.

Beney for the defendants, plaintiffs on the counterclaim. The defendants did all that was necessary to entitle them to commission. The meaning of the words in the letter of February 18, "on a sale being effected," is "on our getting a purchaser's signature to a binding contract": *Rose* v. *Perry & Daw.* (1) This they did. In *Fisher* v. *Drewett* (2) Bramwell L.J. said: "The current of modern opinion is to the effect that those who bargain to receive commission for introductions have a right to their commission as soon as they have completed their portion of the bargain, irrespective of what may take place subsequently between the parties introduced." In *Passingham* v. *King* (3), where the commission claimed was "one per cent. upon the purchase money," A. L. Smith L.J. said that meant "one per cent. upon the money contracted to be paid." If it was necessary, as was held by the Court of Appeal in *James* v. *Smith* (1), that the defendants should find a purchaser able, ready and willing to complete, the plaintiff waived that requirement, for by his contract with Robinson he agreed that "the purchaser is at liberty to assign this contract to a company and is then released from further liability under this contract." This shows that the plaintiff was not looking to the purchaser's ability to complete at all.

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(1) Unreported. Decision of the Court of Appeal (Scrutton, Greer and Russell L.JJ.), dated July 24, 1929. See Estates Gazette, July 27, 1929.

(2) (1878) 48 L. J. (Ex.) 32, 33.

(3) (1898) 14 Times L. R. 392.

Casswell for the plaintiff, defendant on the counterclaim. This case is governed by *James* v. *Smith* (1), where it was held by the Court of Appeal that the agent must introduce a purchaser able, ready and willing to complete. Atkin L.J. held in that case that the onus of showing that he had introduced such a purchaser lay on the agent. In *Knight, Frank & Rutley* v. *Gordon* (2) commission was payable on the purchase price on "sales by private treaty," and it was held payable only when the price had been paid. In *Rose* v. *Perry & Daw* (3) the completion did not take place owing to an arrangement come to between the vendor and the purchaser introduced by the agents. The defendants have produced no evidence to explain why the completion did not take place, and have thus failed to discharge the onus which was on them.

[*Peacock* v. *Freeman* (4) and *Price, Davies & Co.* v. *Smith* (5) were also referred to.]

The clause in the agreement allowing Robinson to assign to a company was merely a licence to assign and did not operate as a waiver.

Beney replied.

CHARLES J. In this case Arthur Martin sues Messrs. E. W. Perry & Daw, who are estate agents, for the sum of 120*l.*, which was a sum received by the defendants for the use of the plaintiff, it being the amount of deposit paid to the defendants for and on behalf of the plaintiff, as his agents, by

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(1) Unreported. Decision of the Court of Appeal (Bankes, Scrutton and Atkin L.JJ.), dated June 7, 1921. See note at end of this report.

(2) (1923) 39 Times L. R. 399.

(3) Unreported. See Estates Gazette, July 27, 1929.

(4) (1888) 4 Times L. R. 541.

(5) (1929) 45 Times L. R. 542.

Mr. Henry Thomas Robinson on an intended sale of the plaintiff's business and goodwill of a tobacconist's business. There is no question at all between the parties that the plaintiff was entitled to that sum. The real matter for decision arises upon the defence and counterclaim, and the defence set up and counterclaim are as follows. There is an allegation in para. 2 of the defence that on November 14, 1927, the plaintiff verbally instructed and authorized the defendants, as agents upon his behalf, to find a purchaser of the said business, and on February 18, 1929, he verbally undertook to remunerate the defendants for such services by paying them commission at the rate of 5 per cent. on the first 1000*l.* and 2½ per cent. on the balance of the total purchase price obtained. By his reply the plaintiff denies that the defendants were instructed to find a purchaser as therein alleged, and in para. 2 says that it was a term of the agreement that the said commission should be payable to the defendants when they should have effected a sale of the said business and not otherwise, and that the said agreement was confirmed in writing by the defendants by a letter dated February 18, 1929. So that although by their pleadings the defendants have counterclaimed upon a verbal agreement and upon a verbal agreement alone, the plaintiff has indicated that what passed verbally was set down in this letter of February 18, 1929, and they rest themselves upon that letter. If it had not been for that I should have said that the defendants had entirely failed, because they had pleaded verbal agreements and given no evidence of any sort or description that there was any verbal agreement at any time; and it is only because it is introduced by the reply that I am enabled to look to the letter of February 18.

What does that letter say? It must be remembered that the plaintiff was desirous of selling his tobacconist's businesses at Norbury and West Norwood and Penge, and he got into touch with the defendants, and there is no evidence whatever as to what happened. Then upon February 18, 1929, the defendants wrote the following letter to Mr. Martin: "Referring to our interview to-day we write to confirm that you are prepared to accept for the lease, goodwill, fixtures and fittings of these businesses . . . ., the sum of 2400*l.*, and that on a sale being effected, you are prepared to allow us a commission of 5 per cent. on the first 1000*l.* and 2½ per cent. on the balance of the total purchase price, we to take stock on your behalf for a fee of 5 per cent. on the amount declared." That is the effective part of the letter.

It is upon that letter that the dispute arises, and it does so upon these two sets of words: "on a sale being effected" and "2½ per cent. on the balance of the total purchase price." Does "on a sale being effected" mean that the defendants have not only to introduce a purchaser, but that consequent upon that introduction there is to be an agreement and consequent upon that agreement that there is to be a completion, or does it mean that they earn their commission by the simple introduction of a purchaser who says he will purchase?

It is pressed upon me by Mr. Beney, for the defendants, that it is sufficient that they should introduce a person willing to purchase; a person who enters into an agreement and no more; that there may be no completion; that the person introduced by the defendants may be a man of straw, a man who never could at any time be in a position to complete; and it is put on their behalf that that does not matter at all, and that they have done all that an estate agent can be called upon to do in introducing that person.

It is pressed upon me by Mr. Casswell, for the plaintiff, particularly by reference to the unreported case of *James* v. *Smith* (1), that that is not enough; that one does not effect a sale unless (*a*) one introduces a purchaser who pursues the matter to completion, or (*b*) that one introduces a purchaser who at all times and at the proper time is ready, able and willing to execute the contract into which he enters.

The case of *James* v. *Smith* (1) is, I think most unfortunately, not reported, for it has been cited in many cases subsequent to the date when it was decided by the Court of Appeal, and not for the first time I have to look at an unproved shorthand note of the case. It is one of the most comprehensive decisions in relation to the sale of premises by an estate agent and the terms upon which he can gain his commission therefrom, and I think it is a matter of real regret that it appears nowhere in any of the reports. In that case the words were a little different, but not very different. The question for decision there was what was meant by the words : " . . . . and to pay you a commission of 1000*l.* if the business is sold at this figure." In the present case the words are that the commission shall be paid " on a sale being effected." I cannot see that there is very much difference between the words in these two cases, although it is alleged that the case of *Rose* v. *Perry & Daw* (1) is by its actual terms nearer and more akin to the case which I am considering. I am not prepared to say that that is so. I think that *James* v. *Smith* (2) is as nearly like this case as one can find.

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(1) Unreported. Decided by the Court of Appeal (Bankes, Scrutton and Atkin L.JJ.) on June 7, 1921. See note at end of this report.

Bankes L.J. puts the matter as follows in *James* v. *Smith* (2) : " Now, assume that the question for decision is, what is meant by the words : ' and to pay you a commission of 1000*l.* if the business is sold at this figure ' ? As I understand the contention for the appellants they put their argument in this twofold way. They say those words either mean, if the sale is completed and the purchase money paid—that is what is meant by ' sold '—or they mean if the business is sold, meaning a contract of purchase is signed, but by a person able and willing to complete." The judgment goes on : " They mean, and must mean, a purchaser ready and willing to purchase in the sense of a purchaser able to purchase and able to complete as well ; they do not mean and cannot mean a purchaser in the sense either of a man of straw or of a man without means " ; and those observations in the judgment of Bankes L.J. are confirmed and somewhat elaborated by Scrutton L.J. and by Atkin L.J. (as he then was).

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(1) Unreported. Decided by the Court of Appeal on July 24, 1929. See Estates Gazette, July 27, 1929.

(2) Unreported. Decided by the Court of Appeal (Bankes, Scrutton and Atkin L.JJ.) on June 7, 1921. See note at end of this report.

What happened in this case was that the defendants introduced a gentleman called Mr. Robinson. Was Mr. Robinson a person ready, willing and able to purchase and able to complete as well? It was said as clearly as anything can be said, in Atkin L.J.'s judgment in *James* v. *Smith* (1), that the onus is upon the estate agent to show that the person whom he introduced was a person of that character—a person able to purchase, a person able to complete as well. No evidence at all has been called before me, so that the defendants have not indicated to me in any way who Mr. Robinson is, or what he is; whether he is a moneyed man or whether he is a penniless man. I know nothing about him. All I know is that he is a person who appears upon the agreement which is entered into between himself and the plaintiff for the sale of these tobacconists' premises. I do not know who he is, and the defendants have not satisfied me that Mr. Robinson was a person able to purchase or able to complete, and it rested upon them to satisfy me that he was such a person.

It is truly said that this agreement between the plaintiff and Mr. Robinson is a very odd one, because it has a curious clause, as follows: "The purchaser is at liberty to assign this contract to a company and is then released from further liability under this contract." Mr. Beney contended that that wipes out the necessity of the defendant's indicating to the Court that the signatory to the contract, Mr. Robinson, was a man who was able to purchase and able to complete; because the plaintiff in signing that contract says in effect: "I do not care whether he is or whether he is not able to purchase or able to complete, because I give him the liberty at any moment of assigning this contract to a company, and he is then released from further liability under the contract." I cannot see that that contention is one which can be well sustained. It is only a liberty given to assign; the purchaser might never have assigned; and, as Mr. Beney frankly said, if he had not assigned (and in this case he did not assign) then the plaintiff Martin must look to Mr. Robinson. Mr. Robinson did not complete; there has never been any completion; and I cannot see, in those circumstances, that the defendants have done that which it is necessary they should do before they can claim their commission. They have not satisfied me in this case that they have ever introduced a purchaser who, in the words of Bankes L.J., was ready, willing and able to purchase and able to complete as well.

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(1) Unreported. Decided by the Court of Appeal on June 7, 1921. See note at end of this report.

The result is that there will be judgment for the plaintiff for 120*l.*, and judgment for the plaintiff on the counterclaim.

Judgment for plaintiff on claim and counterclaim.

Solicitors for plaintiff: *Burton & Son.*

Solicitors for defendants: *Kenneth Brown, Baker, Baker.*

W. L. L. B.

Dictum of ATKIN, L.J., at p. 322, *applied.* DENNIS REED, LTD. *v.* NICHOLLS. [1948] 2 All E.R. 914.

NOTE.

COURT OF APPEAL. June 7, 1921.

JAMES *v.* SMITH.

APPEAL from Shearman J.

The plaintiff's claim was for commission on the sale of the Central Hotel, Bournemouth. The defendant, on behalf of the vendors, wrote the following letter to the plaintiff dated January 6, 1920: "Gentlemen. Re your representative's call. I am prepared to sell the freehold of the Central Hotel, together with the business, furniture and effects, for the sum of 31,000*l.*, and to pay you a commission of 1000*l.* if the business is sold at this figure." The plaintiff introduced a purchaser who signed a contract with the vendors to purchase the hotel for the sum named. He was unable to complete the purchase. The plaintiff claimed commission, and Shearman J. gave him judgment.

The defendant appealed.

Charles K.C. and *J. G. Trapnell* for the defendant.

Holman Gregory K.C. and *Rayner Goddard* for the plaintiff.

BANKES L.J. The question in dispute between these parties is whether the plaintiff had earned his commission. The defendant was a lady who was the largest shareholder in the Richardson Hotel Company, Ld., which owned the Central Hotel, Bournemouth, and she was apparently authorized by the company to sell the property. The plaintiff got into communication with her, and on January 6, 1920, she gave him a letter, which is the commission note on which this action is founded. It was in the following terms: "Gentlemen. Re your representative's call. I am prepared to sell the freehold of the Central Hotel, together with the business, furniture and effects, for the sum of 31,000*l.*, and to pay you a commission of 1000*l.* if the business is sold at this figure." It was signed by the defendant. It is quite plain that this document is incomplete and barely intelligible, but the Court must put some construction upon it. Now assume that the question for decision is, what is meant by the words: "And to pay you a commission of 1000*l.* if the business is sold at this figure." As I understand the contention of the defendant, she puts her argument in this twofold way. She says those words either mean, if the sale is completed and the purchase money paid—that is what is meant by "sold"—or they mean, if the business is sold, meaning a contract of purchase is signed, but by a person able and willing to complete. On the other hand, I understand the contention for the plaintiff to be that "if the business is sold" means if a contract to purchase is, in fact, signed by some one introduced by him with whom the vendor is willing to make a contract, regardless whether the person introduced can or cannot complete the purchase. It is between those three suggestions that the Court has to elect, and in my opinion the one I mentioned second is the true interpretation of this document, and I think the words mean, if a contract of purchase is signed, but by a person able and willing to complete. I arrive at that by this process of reasoning. It is necessary, as I have said, to imply consideration moving from the plaintiff into the agreement to make it a complete contract, and if that consideration were written out and added to the document it would be: "In consideration of your finding for me a purchaser." What is the meaning to be attached to those words? They mean, and must mean, a purchaser ready and willing to purchase in the sense of a purchaser able to purchase and able to complete as well; they do not mean and cannot mean a purchaser in the sense either of a man of straw or of a man without means.

Assuming that to be the consideration moving from the plaintiff and written into the document, what is the position of a purchaser able to purchase having been introduced to the defendant, and she refusing to enter into a contract? Mr. Gregory, for the plaintiff, does not dispute that he would have been under an obligation to prove that the purchaser whom the defendant refused to accept was a person ready and willing and able to complete the contract. If that is the meaning of the consideration it appears to me that it must remain and be part of the contract, whether the defendant refused to accept the purchaser or whether she accepted him, if the purchaser signs the contract. There cannot be two different meanings to the contract depending upon whether the defendant accepts the purchaser or whether she refuses to accept him. I understand Mr. Goddard, for the plaintiff, to say that although that may be true and may be the meaning of the contract, yet when a purchaser is introduced and the defendant elects to enter into a contract with him that, in some way and for some reason which I do not follow, absolves the plaintiffs from any obligation on their part to fulfil the consideration which was part of the contract with the defendant.

I understand that that was the view accepted by Shearman J. In the earlier part of his judgment he seems to have taken the same view as I am taking, for he said it was obviously the intention of the parties that 31,000*l.*

should be fixed as the purchase price in order that the defendant should receive 30,000*l.* and the plaintiff 1000*l.*, which indicates that in his view the bargain was that the commission should be payable out of the purchase money. But then he went on to say that the plaintiff introduced a purchaser, and the defendant then had the chance of inquiring as to the purchaser's solvency, and that if she did not choose to avail herself of that chance it was her fault, and it did not lie in her mouth to say any longer that the plaintiff only earned his commission in the event of his introducing a customer able and willing to complete. Mr. Goddard relied upon *Passingham* v. *King* (1) as supporting that contention, and he suggests that the Court of Appeal in that case held that the vendor was liable, because from the moment the contract was signed he had taken the case out of the hands of the agents. A. L. Smith L.J. said (1): " In these circumstances, he was of opinion that the defendant had taken up the negotiations himself and taken them out of the hands of the plaintiff and had accepted Vine as the purchaser." One does not know whether the words were intended by the Lord Justice to refer to the negotiations between the vendor and the purchaser subsequent to the contract of sale, or whether he intended them to apply to the contract of sale as well, but he speaks of the defendant taking up the negotiations himself and taking them out of the hands of the plaintiff. In the present case there was no taking the business out of the hands of the plaintiff; if he was absolved from the duty of finding a purchaser able and willing to purchase it was merely because the defendant had signed the contract with the person introduced. There was no taking the business out of the plaintiff's hands in the sense in which A. L. Smith L.J. speaks of taking the business out of the hands of the agent in that case. I do not propose to go through the other cases that have been referred to; they really all depend on the particular facts of each. *Horford* v. *Wilson* (2), cited by Mr. Goddard, is very like the present case in its facts, but the language of the learned judges in that case does not seem applicable, for the reason that the point we are now considering was not taken before them. In *Green* v. *Lucas* (3) the view taken by the Court of Appeal as to the obligation of an agent who is claiming commission—namely, that he must introduce a person ready and willing either to take or to buy, as the case may be—seems to me to be an authority for the view we are taking in this case. With regard to the other cases they all seem to me to have turned upon the particular language of the contracts. In some of them, as in *Chapman* v. *Winson* (4) or in *Lott* v. *Outhwaite* (5), there were words in the contracts which clearly indicated that the commission was only payable either out of the purchase money or on completion of the purchase.

For the reasons I have indicated I do not agree with the view taken by Shearman J., because I think that the obligation of the plaintiff being to introduce a person who was able to purchase, he has no evidence that the particular purchaser whom he introduced was in that position, and having failed to give that evidence his action fails, and the appeal must be allowed.

(1) (1898) 14 Times L. R. 392.

(2) (1807) 1 Taunt. 12.

(3) (1875) 33 L. T. 584.

(4) (1904) 91 L. T. 17.

(5) (1893) 10 Times L. R. 76.

SCRUTTON L.J. I agree. The question in this case is whether an agent is entitled to commission who has introduced a man who has signed an agreement to purchase, but who is apparently quite unable to complete that agreement because he has no funds. The first question in all these commission cases is a very obvious one, but one which is frequently overlooked; that is the question mentioned by Lord Collins M.R. in *Chapman* v. *Winson* (1): "The parties can agree upon any particular event upon which commission is to become payable, and the question in the present case is what is the event upon which the parties have agreed that commission shall be payable ?" It is quite open to the parties to use language that makes it clear that the commission is only payable on the money ultimately received or which might have been received but for the vendor's fault. It is quite possible for the parties to make it clear that the commission is to be payable as soon as a contract for purchase has been made, whatever happens to it and with whomsoever it is made. What the event is which entitles the agent to commission depends on the contract in the particular case. In the present case that contract is to be found in the letter of January 6, 1920, a letter written by the defendant at the dictation of the plaintiff. It is as follows: [His Lordship read it.]

Now, what does the agreement mean, and what is the event which will entitle the agent to his commission ? In my view it is at least this: If you introduce a person who will make an agreement of purchase with me and whom you have reasonable cause to believe is ready and willing to purchase, I will pay you 1000*l*. I say it is at least that, but I think it is more, for a reason that I will give later. The other view, from which, indeed, Mr. Gregory, for the plaintiff, did not shrink, involves this, that if I introduce a man of straw, saying nothing as to his capacity, although I know him to be a man of straw, who is willing to sign an agreement, I shall have earned my 1000*l*., although I know that the man I have introduced is quite unable to fulfil his obligations.

Now if that is the least obligation that can be put on the agent, the latter, at the trial, no doubt advised by his counsel, took the course of not going into the box himself to state what his knowledge of the purchaser was, and there was no evidence whatever of the ability of the purchaser to carry out any agreement of purchase at the time he made it. So far as there was evidence it suggested that he had no ability to carry it out. He was said by his solicitors to be a person of no means; he is stated to live in a very small house, and it does not appear that he had any binding agreement with anybody to provide him with capital. On these facts it appears to me that the agent has not proved the minimum of his obligation, and he therefore fails. But I think his obligation is larger than that, because it is agreed that if he had introduced a purchaser, but the vendor had declined to sell to him, the agent, to earn his commission, would have had to prove, not that he introduced the purchaser whom he had reason to believe was ready and willing to purchase, but that he had introduced a person who in fact was able and willing to purchase. I find it very difficult to believe that the measure of obligation is different in the case where the vendor does not sell to the purchaser introduced, from what it is in the case where he does sell to the purchaser introduced. If, of course, the minimum is ability and willingness, and not mere reasonable cause to believe in ability and willingness, the agent also fails, on the language used by two such masters of the common law as Bramwell B. and Blackburn J. in *Green* v. *Lucas*. (1) As I understood the argument for the plaintiff it was this: True it is, that if you did not sell, my obligation was to show that I had introduced a man able and willing to purchase, but I am entirely relieved of that obligation if you do enter into an agreement with the man I introduced, although he is, in fact, quite unable to purchase, and although you made no inquiry but relied on my position as an agent. It seems to me that in a case like that the more reputable an agent and the more likely the vendor is to rely on him, the more difficult will be the position of the vendor, and the more likely he is to make an agreement with a man whom a respectable agent has introduced, the more difficulty the vendor will be in when the purchaser turns out to be a man with no means at all.

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(1) 91 L. T. 17, 19.

On that limited ground I am unable to agree with the judgment of Shearman J. I quite see that on other agreements there might be questions of great difficulty. I see, for instance, that the point on which A. L. Smith and Vaughan Williams L.JJ. disagreed in *Passingham* v. *King* (2) is a question of very considerable difficulty, which I am relieved not to have to decide in this case. I decide this case on the wording of this contract on the minimum obligation which appears to me to be put by the contract on this plaintiff, and on the fact that he gave no evidence to satisfy that minimum obligation.

ATKIN L.J. I agree. I think the letter of January 6 was a commission note, and was intended to record the terms of the employment of the plaintiff. The question arises on the construction of the words: "I am prepared . . . . to pay you a commission of 1000*l*. if the business is sold at this figure." I think the agreement to pay the commission of 1000*l*. if the business was sold does relate to the figure of 31,000*l*. That is not sufficient to enable me to get at the meaning of this contract, because, so far, it does not express what is to be done by the plaintiff, and that term has to be implied; and it seems to me that it is on the question of what terms are to be implied that the difficulty in this case really arises. There has to be an implication made as to the subject-matter of the contract from the relations of the parties and from the rest of the language which constitutes the contract between them. It appears to me it must mean this: "I agree to pay you a commission if the business is agreed to be sold by you or through your services," and that involves the further question, what services? Now it appears to me that the true view in this case is: "If you introduce a purchaser ready and willing to purchase the property at this price." I think, upon the whole, the balance of authority binding upon us is in favour of this view, and is the true result of *Green* v. *Lucas* (1), and I think it represents what would be the term necessarily inserted if the parties had turned their minds to expressing it in order to give validity to the arrangement which they were entering into. In a contract of this kind, which is a contract of employment of an agent to procure a purchaser for the purchase of real estate, I do not think that the agent, in the absence of any express contract to the contrary, performs his obligation merely by introducing a person who is willing to enter into a contract to purchase the property. In my opinion the purchaser must be willing and ready, that is to say, able, up to the time he signs the contract. There are two reservations I want to make in respect of this matter, because this is a very important matter, and questions as to commission interest so many people, that they are generally reported more or less imperfectly somewhere or other. I say this because a great many of the reports of commission cases omit altogether the terms of the contract upon which the commission is claimed, which is not an immaterial circumstance. As a matter of fact the result depends so often on the terms of the contract, and nothing but the terms of the contract, that it is very seldom that one case really is a guide in respect of future cases. I think that "ability" does not depend upon whether the purchaser has the money in hand at the time; to my mind it is a question of fact. I do not think it depends upon whether he has a binding agreement by which some third person is obliged to provide him with resources to carry out the contract. I think it is sufficient if it is proved by the agent or by the purchaser that the circumstances are such that if the vendor had been ready and willing to carry out his contract, he on his part at the proper time could have found the necessary money to perform his obligation. Again, to my mind, this question is independent of the question whether or not it is the duty of the agent to make inquiries whether the person he introduces is able to carry out his contract. There may be some cases in which it is the duty of the agent to make such inquiries, and one case was cited to us in which a judge of first instance held that such was the duty of an agent who was employed to find a tenant of a furnished house, and I do not wish to say that that is not his duty. On the other hand, I think it is quite plain that there are cases where the agent is not expected to make inquiries himself, and it is quite possible he may leave it to the vendor to make them; and, of course, there may be cases where this term does not arise, and so it is quite consistent with there being an implied term that the agent is under no obligation to make inquiries, the only result being, if he does not make inquiries and the person he introduces is not apparently able and willing to perform the contract, he does not then earn his commission. To my mind the obligation, when it exists, is an absolute obligation; that is to say, it is performed by introducing a person who in fact is ready and willing, and the contract is not performed merely because the agent believes, on reasonable grounds, that he is ready and willing. Such a belief might have a very important bearing if one were really considering the question whether the agent had any duty to make inquiries. As I say, I think this case is independent of such a matter as that, and it must be distinguished from a case of employing a person to obtain commercial contracts in respect of the sale of goods, as, for instance, the case of an ordinary commercial traveller employed in obtaining orders. I am not saying that there cannot be implied terms in such cases, but nothing that has fallen from me must be taken as implying that I think such a condition would exist in the employment of such agents. In this particular case I think that the true view is that the agent was employed upon the terms to find a purchaser ready and willing to carry out a purchase at 31,000*l.*, and that readiness and willingness must exist at the time the contract was entered into. It appears to me quite plain, upon the facts of this case, that this purchaser who was introduced was not able to carry out the transaction, because within a week before the arrival of the time for completion his solicitor wrote in terms to say that he was unable to carry out the transaction, and in view of that evidence, there being no countervailing evidence at all to indicate that the purchaser was able to carry out the transaction, it appears to me quite plain that the plaintiff fails in the onus that is cast upon him, and I think, therefore, that he did not do enough to entitle him to recover his commission. I think, therefore, that the appeal must be allowed.

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(1) 33 L. T. 584. (2) 14 Times L. R. 392.

Appeal allowed.

Solicitors for appellant: *Bentley & Jenkins, for Tattersall & Son, Bournemouth.*
Solicitors for respondent: *Blundell, Baker & Co., for J. M. B. Turner, Bournemouth.*

W. L. L. B.

PHARMACEUTICAL SOCIETY OF GREAT BRITAIN *v.* WATKINSON.

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April 24.

Pharmacy Acts—Chemist—Sale of Poisons—Restrictions—Use of Automatic Machines—Carrying on the Business of Chemist—Conducting the Business—Pharmacy Act, 1868 (31 & 32 *Vict. c.* 121), *s.* 15—*Poisons and Pharmacy Act*, 1908 (8 *Edw.* 7, *c.* 55), *s.* 3.

By s. 3, sub-s. 1, of the Poisons and Pharmacy Act, 1908: "Any person who, being a duly registered pharmaceutical chemist or chemist and druggist, carries on the business of pharmaceutical chemist or chemist and druggist shall, unless in every premises where the business is carried on the business is bona fide conducted by himself or some other duly registered pharmaceutical chemist or chemist and druggist, as the case may be, ... be guilty of an offence under s. fifteen of the Pharmacy Act, 1868."

The defendant, a duly registered chemist and druggist, sold and offered for sale (inter alia) lysol, a poison, from an automatic machine which he had placed just outside the door of his shop:—

Held, that the sale of the lysol by means of the automatic machine was not an offence under s. 15 of the Pharmacy Act, 1868, and s. 3, sub-s. 1, of the Poisons and Pharmacy Act, 1908. The business carried on by means of the automatic machine was bona fide conducted by the defendant himself within the meaning of s. 3, sub-s. 1, of the Act of 1908.

APPEAL from Wood Green County Court.

The defendant was a duly registered chemist and druggist, carrying on business at No. 384 Lordship Lane, N. He had sold (inter alia) lysol by means of an automatic machine placed outside his shop.

The Council of the Pharmaceutical Society of Great Britain claimed to recover from him the sum of 5*l.* as a penalty under s. 3, sub-s. 1, of the Poisons and Pharmacy Act, 1908. (1) They alleged that from January 14 to January 28, 1930, or on one or other or both of those dates, the defendant carried on the business of chemist and druggist by placing upon his premises at 384 Lordship Lane, N. 17, an automatic machine, and selling or offering for sale poisons by means of that machine. They also alleged that that business was not bona fide conducted by the defendant or by some other duly registered pharmaceutical chemist or chemist and druggist; and that in the premises the defendant was guilty of an offence under s. 15 of the Pharmacy Act, 1868 (2), and was liable to pay the plaintiffs a penalty of 5*l.*

An inspector employed by the plaintiff society visited the defendant's premises on January 14, 1930, at 5.45 P.M.; again on January 16, 1930, at 5.30 P.M.; again on January 17 at 11 P.M.; and again on January 28 at about 11.15 P.M. On the first occasion when the inspector visited the premises the shop was open for business, but on the other occasions it was closed. The inspector proved that bottles of lysol were exposed for sale in the automatic machine, and that by placing a coin in the slot any person tall enough to reach the slot and provided with the requisite coin could obtain a bottle of lysol. The bottles of lysol bore the defendant's name and address and a statement that they contained 50 per cent. of cresol, and they were labelled "Poison." The machine was divided into compartments, and in those compartments articles such as were commonly sold by chemists were exhibited for sale. Ammoniated tincture of quinine, in addition to lysol, was one of the articles contained in the machine and exhibited for sale. The front of the compartment was of glass, and by looking through the glass a purchaser could see the article he wanted. There was no separate light for the machine, and when the shop was closed the purchaser had to rely on the street lamps to enable him to see the article he wanted. The operation of obtaining the bottle containing lysol was so simple that a boy or girl could have done it—namely, by putting a sixpence in the slot and opening the compartment where the bottle of lysol was placed. The bottles of lysol were analysed by a qualified analytical chemist, and were found to contain over 40 per cent. of homologues of carbolic acid. All substances containing more than 3 per cent. of those homologues were in the poisons schedule.

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(1) The Poisons and Pharmacy Act, 1908, s. 3, provides:

"(1.) Any person who, being a duly registered pharmaceutical chemist or chemist and druggist, carries on the business of pharmaceutical chemist or chemist and druggist shall, unless in every premises where the business is carried on the business is bona fide conducted by himself or some other duly registered pharmaceutical chemist or chemist and druggist, as the case may be, ... be guilty of an offence under s. fifteen of the Pharmacy Act, 1868."

(2) The Pharmacy Act, 1868, s. 15, provides that any person guilty of an offence under that section shall be liable to a penalty or sum of 5*l.*, which "may be sued for, recovered, and dealt with in the manner provided by the Pharmacy Act. . . ."

The county court judge found the following facts : (1.) That the defendant had placed the automatic machine so close to his shop that for all practical purposes it formed part of his premises, with the object of inviting the public to purchase therefrom the articles contained therein ; (2.) that by himself or his servants or agents he placed, or caused to be placed, bottles of lysol in the automatic machine and various other articles sold by chemists in other compartments of the same machine. There was no evidence who actually placed or arranged the placing of the lysol in the machine or what were the qualifications of such servants or agents ; (3.) that the lysol contained in the bottles offered for sale in the machine was a very dangerous poison ; (4.) that, as the lysol could be obtained at times when the shop was closed, no supervision was in fact exercised over such sale, nor was it possible for any such supervision to be exercised ; (5.) that the defendant by selling and by offering for sale various articles contained in the automatic machine carried on the business of a chemist or druggist at that automatic machine, and at all hours when the shop was closed offered the bottles of lysol for sale to the public through the medium of the automatic machine ; and (6.) that bottles of lysol were in fact offered for sale, and that, following upon such offers, sales did in fact take place, and that the sale of lysol was part of the business of a chemist and druggist.

The county court judge was of the opinion that the words in s. 3, sub-s. 1, of the Act of 1908, "the business is bona fide conducted by himself," meant much more than merely carrying on the business. The words had a personal note which was wanting in the words "carries on the business." "To conduct" meant active participation in the business. The judge held that the defendant carried on the business of a chemist and druggist through the medium of the automatic machine, at which he sold to the public a dangerous poison, and that such business was not bona fide conducted by him. Judgment was accordingly given for the plaintiffs for the amount claimed with costs.

The defendant appealed.

George Pollock for the defendant, appellant. This is a friendly action to determine whether the sale of poisons from automatic machines is contrary to the provisions of the Poisons and Pharmacy Act, 1908. The question arises on the construction of s. 3, sub-s. 1, of that Act, which provides that any person who, being a duly registered pharmaceutical chemist or chemist and druggist, carries on the business of pharmaceutical chemist or chemist and druggist shall, unless in every premises where the business is carried on the business is bona fide conducted by himself or some other duly registered pharmaceutical chemist or chemist and druggist, be guilty of an offence. The effect of that sub-section is that the business must be controlled by the chemist himself or some other qualified person. In other words, the business must have a qualified head. This is the view held by the county court judge in this case. On his own interpretation of the words of the sub-section the learned judge ought to have decided this case in favour of the defendant. The learned judge found as a fact that the defendant had placed the automatic machine so close to his premises that for all practical purposes it formed part of them. There is no ground

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for saying that in this case the defendant's business had not a qualified head. The words "conducting a business" have been construed in the Scottish case of *Linstead* v. *Simpson* (1), where it was held that an isolated sale of poison by an assistant who was not a duly registered chemist, when the registered chemist did not happen to be present, was not an offence under s. 3, sub-s. 1, of the Act of 1908. The word "conduct" was used by Lord Esher M.R. in *Graham* v. *Lewis* (2) as meaning something more than "carrying on business." The words "bona fide conducted by himself or some other duly registered pharmaceutical chemist," mean that a duly registered pharmaceutical chemist must be the responsible person genuinely in charge of the business. On the facts as found by the county court judge there is no ground for saying that the defendant here is not genuinely in charge of his business. Moreover, the Court is here dealing with a penal section in an Act of Parliament, and a reasonable construction in favour of the defendant should be placed on it. The judgment of the county court judge should be set aside.

H. Glyn-Jones, for the plaintiffs, respondents. The decision of the Court is sought on the question of the legality of the growing practice of exposing for sale to the public in automatic machines, drugs and poisons, without personal supervision. The Poisons and Pharmacy Act of 1908 contains provisions designed to ensure that the public should be adequately protected, by providing that poisons should be sold by duly qualified persons. Looking at the object of that Act, it is reasonable, not merely that there should be some one acting as manager, who is a qualified person, but also that the active selling and dispensing of poisons should be immediately under the control of a duly qualified person. The automatic machine constitutes "premises" at which a chemist's business is being carried on. It cannot have been intended that if the business is carried on, for example, in a booth, or a stall, no offence is committed, whereas if the same business were carried on in

(1) 1927 S. C. (J. C.) 101.

(2) (1888) 22 Q. B. D. 1, 4.

a shop an offence would be committed. A state of facts which would constitute an offence against the sub-section in the case of a shop must also constitute an offence in the case of a booth, a stall, or an automatic machine. In s. 3, sub-s. 4, of the Act of 1908, the clearest distinction is drawn between the functions of control and management on the one hand, and the actual personal conduct of the business on the other. The object of the legislation is to protect the public against the handling of poisons by unqualified persons. The judgment of the county court judge should be affirmed.

G. Pollock replied.

Talbot J. The difficulty in this case really arises from an attempt to apply an enactment, the object of which was one thing, to an entirely different purpose.

This action was brought in the county court to recover a penalty under s. 3, sub-s. 1, of the Poisons and Pharmacy Act, 1908, and s. 15 of the Pharmacy Act, 1868. Sect. 3, sub-s. 1, of the Act of 1908 compels a duly registered chemist or chemist and druggist, who carries on the business of a chemist or chemist and druggist, in every premises where the business is carried on, bona fide to conduct the business, that is, the business which is there carried on, by himself, or by some other duly registered chemist, and also prescribes the conspicuous exhibition of the name and certificate of qualification of the person by whom the business is so conducted in any premises, upon them. What happened here was that the defendant, against whom nothing is said with regard to his competence or mode of conducting his business, except that in the view of the plaintiff society, and also of the learned judge, he has broken the law, set up in close connection with his chemist's shop, so that for all practical purposes it formed part of that shop, an automatic machine of the kind which is now exceedingly common, at which, whether the shop was open for business or not, anybody by putting sixpence into the slot could get, among other things, a bottle of lysol which, as the learned judge finds—if that finding was necessary—is a very dangerous poison. I should think no one would doubt that if that can be done without breaking the law it is a very unfortunate fact, because, as the learned judge points out, any child who has attained the very limited stature enabling him to reach the effective part of the machine can get one of these dangerous bottles out and, apparently, can drink it on the spot if he is so minded. I think we are not going beyond our province by saying that the plaintiff society and those who are interested in the matter should, at any rate, consider the question whether this mode of retailing poisons, and I dare say other things ,should not be directly controlled by legislation.

The way in which this case came before the learned judge and comes before us is that it is sought to establish the illegality of the practice of exposing poisons and drugs for sale in automatic machines. Sect. 3 of the Act of 1908 does not appear to have been passed with the intention of dealing with it or, indeed, to have any reference to it. It seems to me that the object of the section is tolerably plain. It is to secure that at every place where the business of a chemist is carried on there should be a responsible person, duly qualified and registered, who personally conducts that business bona fide by himself. Pausing there, I think it is plain that the words "by himself" are used in opposition to "any other person." I do not propose to attempt any definition of what personally conducting means, or to express any doubt that the word "conduct" imports something other than the mere legal ownership of the business in the sense that the occupier of the premises is the principal and the master of those who do the work there. I do not think that this section is in any way directed at the manner in which the business is to be conducted, whether it is to be conducted carefully, or negligently, or in any other respect, or conducted so as to comply with the law. That, I think, is all left by this section to other enactments and the ordinary law affecting the conduct of all businesses of all kinds. What it is directed to is to ensure that the business which is conducted there is conducted personally by a duly qualified and registered person. Also I think it is plain that the words "in every premises" do not mean in every part of the premises, and still less do they mean at all times and hours. In any business of any magnitude the person who does conduct it by himself must necessarily leave at certain times altogether, subject possibly to general instructions and exhortations of one kind and another, and at all times, if the place is of any great size, he must, to a great extent, leave the actual conduct of the business to others who are in subordination to him. None the less, allowing for all that, the business is personally conducted by himself, because it would be impossible otherwise for any chemist in anything like a large way of business to comply with this section at all.

The learned judge has assisted us by coming to some very clear findings of fact. First of all, he says that this machine formed part of the premises, the premises at which this chemist's business was carried on. I think it is quite clear that it did, and that it is impossible to say that this machine constituted separate premises so as itself to come within the words of this sub-section, "every premises where the business is carried on." Then the learned judge finds that by himself, or his servants, or agents, the defendant placed, or caused bottles of lysol to be placed in the machine, and so on. There is no doubt that he either placed or caused them to be placed there. The learned judge finds that it was a dangerous poison, and he finds the way in which the machine worked, that this stuff could be obtained from the machine when the shop was closed, that no supervision was in fact exercised over the sale, nor was it possible that it should be exercised when, as constantly happened, the shop was closed and the machine was available. Then the learned judge says that by selling and by offering for sale the various articles contained in the machine, the defendant carried on the business of a chemist and druggist at the automatic machine. In one sense, of course, that is quite true, but if the learned judge meant by that to find that

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during the times that the shop was closed that machine became separate premises within the meaning of this section, that appears to me, with great respect, to be inconsistent with the first finding of fact and to be a finding which is not supported by the evidence. If he meant that what happened was that, at the part of the premises on which the machine was, business went on, although the rest of the premises were closed, that, of course, is only stating again what he had already stated. The last finding is that the sale of the bottles of lysol was part of the business of a chemist and druggist, that they were sold through the machine as part of the defendant's business as a chemist and druggist.

The plaintiff society relied on the fact that this machine, if I may use popular language, was left to its own devices. I think that is really a fallacy. The business, which was conducted through the automatic machine in this case, was conducted by the defendant, and the way in which the machine was set up and what was put into it, how it could be used, the length of time during which it could be used and so forth, constituted the procedure which he adopted as part of the business of selling chemical preparations which he was carrying on on his premises. To say that he was not conducting the business at all, but that the machine was, would be using the language of a metaphor, which is not accurate in law. The machine was a device set up and used in the way in which it was used wholly by the defendant, by his direction and order, and is really the way in which part of the business which he was conducting at his shop was conducted. He, and nobody else, conducted that part of the business as well as all the rest of it, and he did that, in my opinion, within the meaning of the statute, bona fide; that is to say, I think the words "bona fide conducted by himself" mean simply conducted by himself and by no other, and "bona fide" means that he did not merely depute the conduct of the business to somebody else, while maintaining a nominal control. I do not think those words have anything whatever to do with the fact that this part of the sale of

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lysol, which was conducted at this shop, was conducted through this automatic machine in a way which made it, I entirely agree, quite impossible to supervise the people who bought it or the way in which, or the times at which, they bought it, or, indeed, anything whatever to do with it, except that they could not get a bottle of lysol without putting in either sixpence, or something which the machine would regard as equivalent to sixpence, and they could not get any more lysol than the machine would hold or deliver. There, again—I am using the language of metaphor—one talks of the machine doing this, that and the other, but that is because it has been set there by the defendant in order to do it and because it is an effective machine for that purpose.

The conclusion to which I have come is that whether or not there is any other way of reaching this, which undoubtedly appears on the face of it to be a public mischief, it is not an offence under this section, that the section cannot be construed as prohibiting it except by a construction which, in my opinion, is not only strained but erroneous, and, therefore, I think that the learned county court judge ought to have entered judgment for the defendant, and this appeal must be allowed with costs.

FINLAY J. I entirely agree. I just add a very few words out of respect for the learned judge from whom we are differing. I cannot doubt that, as my brother has said, this is an attempt, and an attempt to which certainly one is not unsympathetic, to apply to a state of facts which has rather recently arisen a section directed to entirely different objects. I do not dissent from the argument which was so forcibly addressed to us by Mr. Glyn-Jones, that there is a distinction in the section between "carrying on the business" and "bona fide conducting the business by himself." I think, as the learned county court judge said, that there is a personal note about the bona fide conduct of the business, but I do not desire to discuss that matter any further, because it is unnecessary here, and also because these words have been discussed with considerable elaboration by the Court of Justiciary in

Scotland in a case of *Linstead* v. *Simpson.* (1) The ground, or one ground at all events, which, in my opinion, makes it impossible for us to support, as I certainly should have wished to support, the decision of the learned county court judge is this: the section speaks of premises in this way, "unless in every premises where the business is carried on," and so forth. We have the findings of the county court judge with regard to this automatic machine; my brother has already referred to them. One knows that these automatic machines, whether inside or outside of shops, are at the present day by no means uncommon. It does seem to me that it is impossible to say that an automatic machine, affixed to the premises in the manner in which we have heard from the case this machine is affixed, is "premises where the business is carried on." The truth of the matter, of course, is that there are not here two premises, one the shop and the other the automatic machine. The premises, so to speak, are all one, and would be treated for every sort of purpose as one, and remain one when there is added to them this automatic machine. Agreeing with every part of what my brother Talbot has said, and agreeing also in the reluctance which he has felt at having to interfere with the decision, particularly on the ground I have last referred to, I do feel that it is impossible to support the decision.

Appeal allowed.

Solicitor for defendant, appellant: *C. H. Kirby.*

Solicitors for plaintiffs, respondents: *Thompson, Quarrell & Attneave.*

(1) 1927 S. C. (J. C.) 101.

T. W. M.

C. A.
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Jan. 14, 15, 16, 19, 20; *Feb.* 9.

BLUNDY, CLARK AND COMPANY, LIMITED *v.* LONDON AND NORTH EASTERN RAILWAY COMPANY.

[1930. B. 5289.]

Public Nuisance—Action—Special and particular Damage—Canal Company—Statutory Obligation to maintain Locks—Collapse of Lock—Delay in repairing—Interference with Transport of Goods—Leeds and Thirsk Railway Act, 1845 (8 *&* 9 *Vict. c. civ.*), *s.* 36—*Regulation of Railways Act,* 1873 (36 *&* 37 *Vict. c.* 48), *s.* 17.

The proprietors of a navigation were bound by statute at all times to keep and maintain the navigation and all the works thereto belonging well and sufficiently repaired and in good order and condition, so that the navigation and every part thereof might be at all times kept open and navigable for the use of all persons desirous to use and navigate the same, and that without any unnecessary hindrance, interruption or delay. They were also authorized to take tolls from persons using the navigation. Certain sand and gravel merchants used to load their sand and gravel upon barges at a point west of the M. lock, part of the navigation, and so transport it eastwards to the city of Y., where they sold it or delivered it under contracts of sale. Without any default of the Proprietors the M. lock collapsed, with the result that the merchants were unable to transport their sand and gravel to Y. by water, and were obliged to forward it by railway at a greater expense, and were also deprived of the use of those of their barges which, when the lock collapsed, were at Y. or at any point east of the lock.

In an action by the merchants against the Proprietors for damages caused by the defendants' breach of duty in failing to maintain the lock the jury found that there had been unnecessary delay for four months in repairing the lock after it had collapsed:—

Held, that the plaintiffs were entitled to damages for this delay, inasmuch as they had suffered special and particular damage above that sustained by the public generally.

Metropolitan Board of Works v. *McCarthy* (1874) L. R. 7 H. L. 243 and *Caledonian Ry. Co.* v. *Walker's Trustees* (1882) 7 App. Cas. 259 followed.

Ricket v. *Metropolitan Ry. Co.* (1867) L. R. 2 H. L. 175 discussed.

Wilkes v. *Hungerford Market Co.* (1835) 2 Bing. N. C. 281 ought to be regarded as correctly decided: per Greer L.J. and *semble* per Scrutton L.J.

APPEAL from the judgment of Hawke J. in an action tried before the learned judge and a special jury.

By an Act of 1767 (7 Geo. 3, c. xciii.) Commissioners were appointed for improving, extending and continuing the navigation of the River Ure from the junction of the Rivers Ure and Swale up the River Ure and for making and maintaining navigable cuts or canals passable for barges, boats, lighters, and other vessels unto, in, through, and over a place called Bondgate Green, at or near to the borough of Ripon.

By an Act of 1820 (1 Geo. 4, c. xxxv.), which recited that under the earlier Act a cut or canal called Milby Cut had been made from and out of the River Ure and running westwards through the townships of Milby and Longthorpe and communicating again with the River Ure, and another cut called the Long Cut had also been made from the River Ure running West into and through part of the borough of Ripon to Bondgate Green near the borough of Ripon; and that the navigation had become obstructed and that none of the original Commissioners were remaining who were qualified to act in execution of the earlier Act; it was enacted that the earlier Act should be repealed, saving all agreements, purchases, sales and conveyances made in pursuance thereof, and a company was incorporated under the name and style of the Company of Proprietors of the River Ure Navigation to Ripon; and the navigation and all things belonging to it were vested in the Company of Proprietors. By s. 4 of this Act the Company of Proprietors were authorized and empowered to maintain and keep navigable and passable for barges, boats, lighters and other vessels the said River Ure from its junction with the River Swale to the borough of Ripon. By s. 76 the Company were empowered to demand and recover such sums as should be from time to time ascertained by them, not exceeding the tolls therein mentioned. By s. 88 they were "required from time to time and at all times to maintain and keep the banks of the said River Ure, and cuts and canals, in good and sufficient repair; and from time to time to strengthen and support the same when necessary for containing the waters of the said river." . . . .

By the Leeds and Thirsk Railway Act, 1845 (8 & 9 Vict. c. civ.), after reciting the two Acts above mentioned and also reciting that it was expedient that the Company to be incorporated—namely, the Leeds and Thirsk Railway Company—should be empowered to purchase the Canal, River, or Navigation of the Company of Proprietors of the River Ure Navigation to Ripon, it was enacted that it should be lawful for the said Navigation Company to sell to the Leeds and Thirsk Railway Company and for the last mentioned Company to purchase and take the navigation and all lands, tenements, easements, rights, appurtenances, engines, utensils, and things whatsoever of the Navigation Company; and by s. 32 that on payment of the purchase money to be agreed the Navigation Company should be dissolved.

By s. 36 of this Act the Leeds and Thirsk Railway Company were "expressly directed and required, from time to time and at all times from and after the making of any such purchase, lease, contract, or agreement as aforesaid," i.e., made under the authority of the Act for or in respect of the purchase of the River Ure navigation to Ripon, "to keep and maintain the said River Ure Navigation, from its junction with the River Swale to the borough of Ripon, and the cuts and canals and all the works thereto belonging, and every part thereof respectively, well and sufficiently repaired, dredged, cleansed, scoured, and in good order and condition, and preserve the supplies of water to the same, so that the same navigation, cuts and canals respectively, and every part thereof, may be at all times kept open and navigable for the use of all persons desirous to use and navigate the same, and that without any unnecessary hindrance, interruption, or delay."

It was agreed between the parties that by virtue of various statutes the navigation, with the rights and obligations conferred and imposed on the Leeds and Thirsk Railway Company, became vested in and transferred to the defendants.

The plaintiffs carried on business as vendors of gravel and sand, which they dredged from the bed of the River Ure at some short distance above Milby Lock, loaded on barges, and conveyed to York. Early in 1928 they were meditating a change in their method of transport by which they proposed to discharge some of their barges above Milby Lock and convey their contents by means of an electric transporter to the defendants' station at Boroughbridge and forward them from thence by rail to various destinations. The rest of the plaintiffs' gravel and sand would be sent as formerly in barges through Milby Lock by the navigation. By para. 7 of their statement of claim the plaintiffs alleged that on or about December 8, 1927, it was verbally agreed between one William Arthur Blundy, one of the plaintiffs' directors, and one Cameron, the defendants' district engineer, that in consideration of the plaintiffs' establishing and developing their business at Boroughbridge and paying the defendants a reduced rate of 3*d.* per ton for the transportation of sand and gravel by the navigation and erecting machinery at their own expense, the defendants would permit the plaintiffs to erect partly upon land of the defendants electric machinery and other plant for carrying sand and gravel over the defendants' navigation and railway, and that they would do what was necessary to put the navigation into repair, the plaintiffs having pointed out the necessity for carrying out repairs thereto. In their particulars the plaintiffs stated that the negotiation leading to this alleged agreement was carried on by Mr. Ebdon, Mr. Storey and Mr. Brown, three officers being in the employment of the defendants and having, as the plaintiffs alleged, authority to enter into the agreement on behalf of the defendants, or being held out by them as having such authority in circumstances which estopped the defendants from denying it. Para. 9 of the statement of claim asserted that in breach of this alleged agreement the defendants had failed to put the navigation in repair. The Court of Appeal held that there was no evidence on which the jury could find that the alleged agreement had been made, or that Cameron, or the three officers named above or any of them, had authority, or had been held out by the defendants as having authority, to make it.

The plaintiffs also alleged that the defendants had failed to perform the duty imposed by s. 36 of the Act of 1845 to keep and maintain the navigation well and sufficiently repaired, and in good order and condition, so that it might at all times be kept open and navigable for the use of all persons desirous to use the same, without any unnecessary hindrance, interruption or delay; and that, notwithstanding warnings of what was about to happen, they failed or neglected to carry out their duty under the statute or under the agreement mentioned above, with the result that on December 13, 1928, Milby Lock collapsed, and the plaintiffs were prevented from transporting their sand and gravel to York by means of the navigation, and that they were deprived of the use of their boats and barges on the York side of the lock. And the plaintiffs further complained that the defendants had been guilty of unnecessary delay in rebuilding the lock after it had collapsed and had been closed to traffic for the purpose of rebuilding and repair.

The learned judge at the trial put ten questions to the jury, of which the following, with the jury's answer thereto, appear to be material to the point of law raised in the case:—

(1.) Did the Railway Company before 1928 negligently fail to take proper steps for the maintenance and repair of Milby Lock? Yes.

(2.) If "yes," would the taking of proper steps have prevented the closing of the lock? Yes.

(8.) Did the defendants fail to reconstruct the lock with reasonable dispatch after it collapsed? Yes.

(9.) If "yes," how long was the delay? Four months.

(10.) Did the defendants cause any unnecessary hindrance, interruption or delay in reconstructing Milby Lock, and if so, for how long? Yes; by four months.

Upon these findings, and others relating to the alleged agreement, the learned judge entered judgment for the plaintiffs. The assessment of damages was referred to Mr. Mitchell-Innes K.C.

The defendants appealed.

Pritt K.C. and *H. I. P. Hallett* for the appellants. It must be admitted that there was evidence on which the jury could find some delay on the part of the appellants in commencing the reconstruction or repair of Milby Lock after its collapse.

But assuming that the position of the appellants is that of a statutory body charged with the duty of repairing and maintaining a highway, a breach of that duty does not give a right of action to every member of the public who is incommoded thereby. He only can maintain an action who can show particular damage suffered by himself over and above that suffered by all the King's subjects.

It was formerly a doubtful point what special and/or when particular damage would enable a private person to bring an action for a public nuisance. In *Iveson* v. *Moore* (1) a colliery owner lost his customers by reason of the defendant's wrongful act in obstructing a highway and so preventing the customers from having access to the colliery; the question was whether this loss of custom was sufficiently particular and special. The Court of King's Bench was equally divided. Gould and Turton JJ. were in favour of the plaintiff. But Rokeby J. and Holt C.J. were of the contrary opinion, the Chief Justice holding that the plaintiff could not have an action for the obstruction merely because his coal mine was near to it; "for though this is a convenience to him, yet the situation does not give him any greater right to the way than any other of the King's subjects." (2) Afterwards by consent of Holt C.J. the case was argued before all the justices of the Common Pleas and Barons of the Exchequer at Serjeant's Inn; and they were all of opinion for the plaintiff, that the action well lay. (3) This case supports the earlier decision in *Hart* v. *Basset* (4), where the plaintiff had a tithe barn easily reached by a highway, which the defendant wrongfully obstructed and so compelled the plaintiff to carry his tithes by a longer and more difficult way; and where it was held that this was particular damage sufficient to entitle the plaintiff to judgment. There followed a number of cases, *Chichester* v. *Lethbridge* (5); *Greasly* v. *Codling* (6); *Wiggins* v. *Boddington* (7); all cited and considered in *Wilkes* v. *Hungerford Market Co.* (1), where the plaintiff claimed damages for the loss of profits in his business of a bookseller by reason of his customers being diverted from his shop in a public thoroughfare by the defendants continuing an authorized obstruction to the thoroughfare for a longer time than was reasonable ; a case which is indistinguishable in principle from the present case. But *Wilkes* v. *Hungerford Market Co.* (1) was overruled by the House of Lords in *Ricket* v. *Metropolitan Ry. Co.* (2) ; see per Willes J. in *Beckett* v. *Midland Ry. Co.* (3) The result is that a plaintiff who claims to have a cause of action in respect of a common nuisance caused by the defendant must prove more than mere loss of profit by reason of the inconvenience to customers resulting from the defendant's wrongful act : see *Winterbottom* v. *Lord Derby* (4), per Kelly C.B.

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(1) (1699) 1 Ld. Raym. 486.

(2) 1 Ld. Raym. 492.

(3) 1 Ld. Raym. 495. See 12 Mod. 267.

(4) (1681) T. Jones, 156.

(5) (1738) Willes, 71.

(6) (1824) 2 Bing. 263.

(7) (1828) 3 C. & P. 544.

Secondly, the appellants are in a position like that of the surveyor of highways, against whom no action will lie for mere nonfeasance : *Young* v. *Davis* (5) ; *Parsons* v. *St. Mathew, Bethnal Green* (6) ; *Gibson* v. *Mayor of Preston* (7) ; *Cowley* v. *Newmarket Local Board.* (8)

[SCRUTTON L.J. referred to *Sanitary Commissioners of Gibraltar* v. *Orfila.* (9)]

du Parcq K.C. and *William Stewart* for the respondents. With all respect to the opinion of Willes J. in *Beckett* v. *Midland Ry. Co.* (3), the House of Lords in *Ricket* v. *Metropolitan Ry. Co.* (2) never intended to overrule the principle of *Wilkes* v. *Hungerford Market Co.* (1) To do that would have involved overruling a long succession of authorities from the year 1535. "If a man makes a ditch across a highway and I and my horse fall into it, there, as I sustain great damage and inconvenience thereby, I shall have an action against him who made the ditch across the road, because I am more damaged than another man. Therefore as the plaintiff had more convenience by that highway than others, and more damage by the stopping of it, because he had no other way to go to his close, therefore in my opinion he shall have this action upon that special matter": per Fitzherbert J. (1) Following upon that case were *Maynell* v. *Saltmarsh* (2); *Hart* v. *Basset* (3); *Iveson* v. *Moore* (4); *Chichester* v. *Lethbridge* (5); *Rose* v. *Miles* (6); *Greasly* v. *Codling* (7); *Rose* v. *Groves.* (8) *Rose* v. *Miles* (6) was a decision upon a writ of error issued in the Court of King's Bench to reverse a judgment of the Common Pleas in favour of the plaintiff, who alleged that he was navigating his barges laden with goods along a navigable creek and that the defendants moored a barge across the creek and obstructed it and prevented the plaintiff from navigating his barges, by reason of which wrongful acts the plaintiff was obliged to carry his goods over land and was put to trouble and expense to the amount of 500*l.* The Court, without calling upon the defendant in error, affirmed the judgment of the Common Pleas. Dampier J. said: " Here the plaintiff "—the defendant in error—" was interrupted in the actual enjoyment of the highway. The expense was incurred by the immediate act of the defendants, for the plaintiff was forced to unload his goods, and carry them over land. If this be not particular damage, I scarcely know what is." In *Ricket* v. *Metropolitan Ry. Co.* (9) the question was whether the plaintiff's public house and land had been " injuriously affected " by the works of the defendants within the meaning of s. 68 of the Lands Clauses Consolidation Act, 1845, and s. 6 of the Railways Clauses Consolidation Act, 1845. The defendants acting under statutory authority had temporarily blocked up a certain carriage way from which a footway led to the plaintiff's public house; but made a temporary bridge across the carriage way communicating with the footway, and had also provided another access to the public-house. (1) The obtruction to the carriage way continued for twenty months, at the end of which time the streets and passages were restored to their original condition. In an inquiry before the under-sheriff and a jury, the jury found that no damage had been done to the structure of the house or premises, but that the plaintiff had sustained damage through interruption of his business, and on that footing they awarded him 100*l.* The case was then moved into the Queen's Bench by a writ of certiorari, the facts being stated in a special case for the opinion of the Court. The House of Lords (Lord Chelmsford L.C. and Lord Cranworth; Lord Westbury dissenting) held that the plaintiff was not entitled to compensation, inasmuch as his premises were not "injuriously affected" within the meaning of the statutes. It is true that Lord Chelmsford and Lord Cranworth spoke in terms of disparagement of *Wilkes* v. *Hungerford Market Co.* (2) But those observations were obiter. The plaintiff in *Ricket's* case (3) had to show that his premises were injuriously affected and that his loss of profit was the result of the injury to his premises; otherwise he could not show a right to compensation. When the House of Lords decided that the premises were not injuriously affected, that decision did not necessarily imply that loss of profit caused by a public nuisance could not be a cause of action to a plaintiff who suffered the loss. Loss of profit might or might not arise from injury to the premises. If it did not, that was enough to decide the matter in dispute in *Ricket's* case. (3) Therefore it was not necessary for the House of Lords to decide that the loss of profit was not sufficient particular damage to give a cause of action for a public nuisance; and in the later case of *Metropolitan Board of Works* v. *McCarthy* (4) Lord Chelmsford himself emphasizes the distinction between the two cases—namely, that there was no injury to the premises in the earlier case while in the later case there was injury to the premises. And, whatever be the true view of *Ricket's* case (1), the principle that a private person, who suffers particular damage beyond that common to all His Majesty's subjects, may have an action on the case against those who create a public nuisance has been repeatedly recognized since the decision in *Ricket's* case (1); see *Metropolitan Board of Works* v. *McCarthy* (2); *Benjamin* v. *Storr* (3); *Fritz* v. *Hobson* (4); *Campbell* v. *Paddington Corporation.* (5) Moreover upon the question whether the premises were injuriously affected, it is difficult to see upon what ground *Ricket's* case (1) is to be reconciled with *Metropolitan Board of Works* v. *McCarthy* (2) and with the later case of *Caledonian Ry. Co.* v. *Walker's Trustees* (6), unless it be that in the first case the obstruction was more remote in point of space from the premises said to have been injuriously affected, as well as less prolonged in point of time, than it was in either of the later cases.

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(1) 2 Bing. N. C. 281.
(2) L. R. 2 H. L. 175.
(3) (1867) L. R. 3 C. P. 82.
(4) (1867) L. R. 2 Ex. 316, 320.
(5) (1862) 7 H. & N. 760 ; affirmed in Ex. Ch. (1863) 2 H. & C. 197.
(6) (1867) L. R. 3 C. P. 56.
(7) (1870) L. R. 5 Q. B. 218.
(8) [1892] A. C. 345.
(9) (1890) 15 App. Cas. 400.

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(1) (1535) Mich. 27 Hen. 8, f. 27, pl. 10.

(2) (1664) 1 Keb. 847.

(3) T. Jones, 156.

(4) 1 Ld. Raym. 486.

(5) Willes, 71.

(6) (1815) 4 M. & S. 101.

(7) 2 Bing. 263.

(8) (1843) 5 Man. & G. 613.

(9) L. R. 2 H. L. 175.

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(1) The facts of this case are more fully stated in the judgment of Lord Selborne L.C. in *Caledonian Ry. Co.* v. *Walker's Trustees* (1882) 7 App. Cas. 259, 281.

(2) 2 Bing. N. C. 281.

(3) L. R. 2 H. L. 175.

(4) (1874) L. R. 7 H. L. 243.

As regards liability for nonfeasance, it has been finally settled by the House of Lords in *Mersey Docks Trustees* v. *Gibbs* (7) that a corporation under a statutory duty to maintain public docks, and having statutory authority to levy tolls for the use of those docks, is liable in damages to persons who suffer from the neglect of the statutory duty. The same law applies to the proprietors of a canal: *Lancaster Canal Co.* v. *Parnaby* (8), affirmed in *Mersey Docks Trustees* v. *Gibbs.* (7) Such statutory bodies differ in their origin and incidents from the surveyor of highways, or highway authorities executing the office of the surveyor of highways, who was merely the representative of the inhabitants of a parish and as such could not be sued, though he might be indicted and fined, for neglect of duty to repair the highways under his supervision: *Cowley* v. *Newmarket Local Board* (9); *Russell* v.

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(1) L. R. 2 H. L. 175.
(2) L. R. 7 H. L. 243.
(3) (1874) L. R. 9 C. P. 400.
(4) (1880) 14 Ch. D. 542.
(5) [1911] 1 K. B. 869.
(6) (1882) 7 App. Cas. 259.
(7) (1866) L. R. 1 H. L. 93.
(8) (1839) 11 Ad. & E. 230.
(9) [1892] A. C. 345.

Men of Devon (1); *Young* v. *Davis* (2); *Glossop* v. *Heston and Isleworth Local Board.* (3)

Pritt K.C. in reply.

Cur. adv. vult.

Feb. 9. The following written judgments were delivered:—

Scrutton L.J. This appeal by the London and North Eastern Railway Company from a judgment against them for damages to be assessed given by Hawke J. after a trial with a special jury at Leeds raises troublesome questions of law and fact. The trial lasted for nine days; it involved complicated questions of a scientific and engineering character, and also a question whether an agreement was reached at a conference, the result, if any, of which was not reduced to writing, and where it is admitted that the representatives of the Railway Company had no authority to make a contract. It was, in my opinion, a singularly unsuitable case to try with a jury, and I am afraid in the result a miscarriage of justice has occurred.

Messrs. Blundy, Clark & Co. carry on a considerable business in the sale of gravel and sand, large quantities of which they obtain by dredging in the River Ure, and carry away by means of barges on that river. By a series of Acts beginning in 1767 the navigation of the river has been improved by dredging and by the erection of locks and the provision of lock cuts. The duty to maintain it has been placed in the hands of various bodies from time to time, and was, at the material times in question in this action, imposed upon the London and North Eastern Railway Co. In 1767 the River Ure, when navigable under the Act, was declared a "free navigation." All the King's liege people were to enjoy free passage along it, subject to payment of the tolls provided by the Act. Tolls were payable only if the vessel passed through locks erected by the Proprietors of the navigation. A second Act repeated these provisions. In 1845 an Act incorporated the Leeds and Thirsk Railway, and empowered them to purchase the navigation with all the rights attaching to it from the then proprietors. Sect. 36 of this Act imposed on the Railway Company a duty "to keep and maintain the said River Ure Navigation, ... and all the works thereto belonging, ... well and sufficiently repaired, dredged, cleansed, scoured, and in good order and condition, ... so that the same navigation, cuts and canals respectively, and every part thereof, may be at all times kept open and navigable for the use of all persons desirous to use and navigate the same, and that without any unnecessary hindrance, interruption, or delay." This Act is by s. 76 a Public Act. Various Acts to which we were not referred appear to have passed on this duty to the defendant Company, who, it will be seen, only became interested in the canal and its locks 150 years after its construction. The duty is also imposed on the Company by s. 17 of the Railway and Canal Traffic Act, 1873. By s. 12 of the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), the Commissioners may award damages to applicants. It was, however, agreed that the Act of 1888 did not repeal or vary the earlier Acts, and that the power to obtain damages before the Railway and Canal Commissioners did not exclude the right, if any, to obtain damages under the provisions of the Act of 1845.

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(1) (1788) 2 T. R. 667.
(2) (1863) 2 H. & C. 197.
(3) (1879) 12 Ch. D. 102.

Counsel for the plaintiffs also agreed that the duty imposed by the Act of 1845 was not an absolute duty to keep in repair, but only a duty to use reasonable care to keep in repair, and that to make the defendant Company liable for damages for not keeping the navigation in repair, he must show negligence on their part. There was to be no "unnecessary hindrance, interruption, or delay." If a lock over 160 years old collapsed, the Company would not be liable under the statute unless by reasonable care on their part they could have foreseen and prevented its collapse. Error of judgment would not be sufficient, unless it was such an error as to be negligent. The Company might also be liable if, after the lock had collapsed, they did not repair and restore it within a reasonable time; that is, if they were negligent in restoring it.

A number of legal questions were raised as to whether the position of the plaintiffs was such that they could recover damages under the statute; but before these questions were reached there was a vital question whether the defendants had been negligent in their management of the navigation. The allegations of statutory default relied on by the plaintiffs were contained in paras. 4, 9 and 11 of the statement of claim and the particulars given thereunder. Para. 4 recites the Act. Para. 5 says: "The plaintiffs who, at all times material to this action, were desirous of continuing their user of the said navigation for the transport of the said sand and gravel, and who have always been ready and willing to pay the proper tolls in respect of such transport, have suffered damage, by reason of the negligent failure by the defendants to maintain and keep the said navigation well and sufficiently repaired and in good order and condition so as to keep it at all times open and navigable for the use of persons, who like the plaintiffs, were or might have been desirous to use and navigate the same." Warnings having been alleged, para. 9 says: "Notwithstanding such warnings and/or knowledge the defendants failed and/or neglected to carry out their statutory duties and obligations and/or their said agreement as hereinbefore set out, with the result that in the month of December, 1928, the said lock partially collapsed; it became impossible to open the gates, and the plaintiffs' sand and gravel business, as then carried on, was stopped." Then para. 11 alleges that because timely reparation work had not been undertaken by the defendants, "the plaintiffs were prevented from transporting their said sand and gravel to the said City of York via the said navigation, and their user of the same was limited to the carrying of the said sand and gravel obtained by dredging in certain only of their boats and barges to Boroughbridge and no further. Other of their boats and barges, being on the York side of the said lock at the time when the defendants closed the said lock, were thereby rendered useless to the plaintiffs." Para. 4 of the particulars gives detailed particulars of the respects in which the defendants were said to have neglected to carry out their statutory duties. The particulars under para. 11 allege: "Notwithstanding the defendants knew or ought to have known that cracks were developing in the walls of the said lock, they failed to take any or any sufficient steps by underpinning the said walls or otherwise to prevent further subsidence or cracking of the said walls, or to repair the said walls in any way. The said reparation work ought to have been done during the said period referred to in para. 4 (*a*) hereof"; and when one turns to para. 4 (*a*) it says: "The defendants so failed and neglected to carry out their said statutory duties for a long period prior to December 13, 1928. The extent of the said period is unknown to the plaintiffs, but it is known to the defendants or their engineers. The said period began before December 8, 1927." These were particulars of default before the lock collapsed. Delay in remedying the collapse was alleged in para. 13, and the particulars thereunder, para. 7 (*a*).

On these points the jury gave the following answers: [The Lord Justice read the questions put to the jury and their answers thereto as above set out, and proceeded:] On the matter covered by questions 8, 9 and 10, the delay in reconstruction, it appeared that the delay alleged was not in the actual reconstruction after the lock had been drained, or freed from water by the construction of a cofferdam, but was in the proceedings between the collapse of the lock and the commencement of reconstruction. The jury found this delay to be four months, and the defendants admitted a delay of two months, though they argued that, for legal reasons to be referred to later, the plaintiffs could not recover damages for this delay.

Milby Lock, which collapsed in December, 1928, was about 160 years old. Its sides were substantial masonry walls, as shown in the photographs, 24 feet from their top to the wooden floor of the lock. As we now know, though no one knew it at the material times before the lock collapsed, the walls rested on the wooden floor; the wooden floor rested on substantial horizontal baulks of timber 2 feet apart across the lock whose ends just projected beyond the outer side of the walls. But instead of these baulks resting, as would be the ordinary method of construction, on substantial piles driven vertically for a considerable depth into the soil underneath, the floor and the baulks supporting the floor, with the walls built on the floor, rested simply on the alluvial soil of Yorkshire. In the course of 160 years the water coming down the lock cut percolated through the soil which supported the lock, deck and walls and gradually washed it away, both under and between the walls. The result was a gradual and uneven settlement down, which, with the unstable foundations, caused the walls to shift and begin to come together. It is to be observed that no one in 1920–28 knew of this absence of piles. When the water was lowest in the lock there were 5 feet of muddy water over the floor. In order to examine the foundations from the inside, the lock would have to be drained, that is, the water would be shut out by cofferdams, which would involve a month's closing of the waterway, the floor would have to be taken up and investigations made between and below the baulks of timber 2 feet apart to ascertain what else, if anything, was under the walls. If the investigation was made from the outside, 24 feet of soil at least would have to be dug away to ascertain what was under the deck, baulks and walls. If, as was supposed, the walls rested on piles, removal of the soil immediately under the lock by percolation of water would be immaterial so long as the deep driven piles were supported at a distance beneath the lock.

These being the actual and undisputed facts of construction, it becomes necessary to examine carefully the evidence called by the plaintiffs to see what were the signs alleged as putting the defendants on inquiry as to what was happening to the lock, and to see what it is alleged the defendants could and should have done to keep the lock in repair, and what repair was possible short of complete reconstruction of the lock, or operations which would take as long as complete reconstruction, and which would not be final. And of course, in considering whether the verdict of the jury was supported by no evidence, or was against the weight of evidence, one must assume that the jury understood what the plaintiffs' witnesses said, and accepted it.

The plaintiffs' business on the Ure was originally carried on by conveying the gravel and sand dredged above Milby Lock down the river to York in their barges. The bargemen apparently worked the locks themselves. In 1927, 81 barge loads of plaintiffs' gravel of about 50 tons each went down, about 4000 tons in all. In the beginning of 1928 the plaintiffs were considering and ultimately decided on a change of method, by which they would discharge some of their gravel above Milby Lock and by an electric transporter carry it to the defendants' station yard at Boroughbridge, thence to be forwarded by rail to various places. The rest of the gravel would still go down the river through Milby Lock in barges. The transporter was ready to work about the middle of November, 1928. The lock collapsed on December 13, 1928. Before its collapse 128 barge loads had gone through the lock in 1928, over 5000 tons in all. Any reconstruction of the lock in 1927 or 1928 would have entirely stopped this traffic, as the transporter was not ready to work till just before the collapse of the lock. When that collapse happened the landing of gravel above the lock and its transmission by rail were not stopped, and in fact during 1929, while the lock was closed for reconstruction, 25,000 tons of gravel was landed and dispatched by rail. So far as this tonnage was intended for York, it would have been cheaper, and it would have been the intention of the plaintiffs, to send it by water through Milby Lock; but the rest of the gravel would have been sent by rail whether the lock collapsed or not, and was not affected by the collapse. Unless repairs could have been effected earlier, which would have saved reconstruction, the plaintiffs by reconstruction before 1928 would have had all their business stopped. After the end of 1928 they only lost that part of their business which they would have sent by water, and on which they had to incur extra cost in sending it by rail. The large quantity they would anyhow have sent by rail was not damaged by the collapse of the lock.

It now becomes necessary to consider: (1.) the nature of the signs and warnings neglect of which is said to show that the defendants were negligent; (2.) the nature of the repairs which it is said the defendants should have done on receiving these warnings; (3.) whether these repairs, if done, would have prevented the collapse of the lock or the necessity for its reconstruction. [The Lord Justice discussed the evidence and, after referring to *Sanitary Commissioners of Gibraltar* v. *Orfila* (1), decided that there was no evidence of negligence on the part of the appellants up to December 13, 1928, the date on which Milby Lock collapsed.]

So far I have only dealt with negligence alleged before the collapse of the lock. There was a further claim for negligence in commencing the reconstruction after the lock had been drained and the exact position ascertained. Negligence in the reconstruction was not alleged; but it was alleged that there was negligent delay in ascertaining and deciding what to do. It was not unnatural that a railway company, faced with the proposal to spend 8000*l.* in reconstructing one lock only of a navigation which had only as a whole yielded 500*l.* a year, took considerable time in seeing if they could avoid the expenditure. A great deal of evidence was given on the subject which I have considered; the defendants appear to admit some delay; the jury in their eighth, ninth and tenth findings assess the delay at four months. I do not think the Court can interfere with this finding. Subject to the legal questions next to be considered, the plaintiffs would therefore be entitled, if there is an actionable breach of the statute, to damages caused by the delay of four months.

The defendants' legal objections to the plaintiffs' right to claim damages were based, as I understood, on two propositions: (1.) That the defendants, as a public authority in the nature of a highway authority, were under the decision of *Cowley* v. *Newmarket Local Board* (2) only liable for misfeasance, not for nonfeasance, and failure to repair was only nonfeasance; (2.) That for breach of a duty owed by them to the public generally only those who showed particular

(1) (1890) 15 App. Cas. 400, 405, 413.

(2) [1892] A. C. 345.

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or special damage beyond that sustained by every member of the public could sue; and that the plaintiffs showed no such particular damage. *Winterbottom* v. *Lord Derby* (1) was cited.

On the first question, the principle of liability of a company empowered by statute to create a canal or navigation free to every one on payment of tolls was stated by the Court of Exchequer Chamber in *Lancaster Canal Co.* v. *Parnaby* (2), an action for damage to a person who had paid tolls, by an obstruction in the canal not caused by the company but which the company had not removed. This was nonfeasance. Tindal C.J., giving the judgment of the Court, stated the principle thus: "The facts stated in the inducement show that the company made the canal for their profit, and opened it to the public upon the payment of tolls to the company: and the common law, in such a case, imposes a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property. We concur with the Court of Queen's Bench in thinking that a duty of this nature is imposed upon the company." This principle was adopted and approved by the House of Lords in the well known case of *Mersey Docks Trustees* v. *Gibbs* (3), also a case of nonfeasance, failure to dredge the entrance to a dock whereby the plaintiff's vessel suffered damage. The principle was in that case extended, from a company maintaining works for its own profit derived from tolls receivable under statute from all the public using the navigation, to a public authority not authorized to make profit out of its tolls. These cases show that the defence that the defendant Company, being by statute bound to use reasonable care to maintain a public navigation and entitled to receive tolls from the users of the navigation, are not liable for nonfeasance, cannot succeed.

(1) (1867) L. R. 2 Ex. 316.
(2) 11 Ad. & E. 230, 242.
(3) L. R. 1 H. L. 93.

On the second point, that the plaintiffs could not succeed because they suffered no particular or private special damage by the closing of the lock, but only the general damage which every member of the public trying to use the navigation and the lock would suffer, fails in my opinion on the facts proved and the decided cases. The contention was supported as being in accordance with the decision in *Winterbottom* v. *Lord Derby* (1), following and purporting to apply the decision of the House of Lords in *Ricket's* case. (2) In *Winterbottom* v. *Lord Derby* (1) the plaintiff claimed that the defendant had obstructed a public highway, so that he (the plaintiff) was compelled to go round by a longer and less convenient road. But it was held that, as this was true of every member of the public, this plaintiff was not entitled to maintain the action, as he had no particular damage other than that of every member of the public. In *Ricket's* case (2) (a decision under the Lands Clauses Consolidation Act, 1845) it was held that the plaintiff's property was not "injuriously affected," because streets leading to his premises were temporarily blocked, whereby though his house was not structurally affected he lost customers. Decisions under the Lands Clauses Consolidation Act become relevant, because, as pointed out by Willes J. in *Beckett* v. *Midland Ry. Co.* (3), to establish a claim under the Lands Clauses Act there must be proved four things, of which the second was that the damage done to his land by the works authorized by the special Act was such that before the special Act he could have maintained an action. Consequently every decision in favour of a claim under the Lands Clauses Act involved a decision whether the cause of the damage was actionable by the then plaintiff if there were no special Act authorizing it. The fact complained of was the narrowing of a public highway in front of his house, whereby his light was diminished, access to his house was affected, and its pecuniary value diminished. Structurally, like the public house in *Ricket's* case (2), his house was uninjured. His house was held to be injuriously

(1) L. R. 2 Ex. 316.
(2) L. R. 2 H. L. 175.
(3) (1867) L. R. 3 C. P. 82.

affected; and this decision was approved by the House of Lords in *Metropolitan Board of Works* v. *McCarthy* (1), where the act complained of was the closing of a way of access to the Thames, which the plaintiff as a member of the public had a right to use, and by the closing of which under the special Act his house was diminished in value by loss of a means of access, though it was not structurally affected.

The position of the present plaintiffs is that, paying tolls, they had brought barges on to the navigation which could not get out of the navigation above Milby Lock because the lock was closed, and that they carried on by means of the navigation a trade in gravel, which in certain parts of the navigation they could not profitably exercise because the cheap method of carriage by the navigation was barred to them by the closing of the lock, and the carriage of the gravel by landing it above the lock was commercially impossible to certain places such as York. There being here no question involving the Lands Clauses Consolidation Act, the decisions collected by Erle C.J. in his judgment in the Exchequer Chamber in *Ricket's* case (2) show, in my opinion, that the facts in the present case would constitute particular damage sufficient to entitle the plaintiff to maintain an action for infringement of a public right, unless the subsequent decisions of the House of Lords in the cases under the Lands Clauses Consolidation Act overrule them. Erle C.J. says: "The action lies where the exercise of the right of way by or on behalf of the plaintiff has been obstructed, and a greater damage has been caused to him thereby than is caused to the Queen's subjects in general by obstructing them in the exercise of their right. This position is not disputed, but the following cases exemplify its application. In *Iveson* v. *Moore* (3) the plaintiff was prevented by the defendant's obstruction of the highway from using the way for carting coals from his colliery, which coals were deteriorated by the delay: in this case the law on actions for obstruction of highways is well discussed. In *Maynell* v. *Saltmarsh* (4) the

(1) L. R, 7 H. L. 243.
(2) (1865) 5 B. & S. 156, 159.
(3) 1 Ld. Raym. 486.
(4) 1 Keb. 847.

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plaintiff was prevented by the defendant's obstruction from carrying his corn, and so the corn became damaged by rain. In *Hart* v. *Basset* (1) the plaintiff, a farmer of tithes, was prevented by the defendant's obstruction from carrying them home; and several grounds of special damage are suggested by Lord Holt in *Iveson* v. *Moore.* (2) In *Fineux* v. *Hovenden* (3) the special damage mentioned as an example is damage caused directly by the obstruction of the plaintiff in the use of the way. In *Greasly* v. *Codling* (4) the plaintiff was prevented by the defendant's obstruction from carrying his coals. In *Paine* v. *Partrich* (5) the plaintiff's damage was not actionable, and the example of actionable damage is put thus, 'a particular damage to maintain this action ought to be direct, and not consequential; as for instance, the loss of his horse, or by some corporal hurt, in falling into a trench in the highway.' In *Chichester* v. *Lethbridge* (6) the obstruction was held actionable because the plaintiff was personally opposed by the defendant in an attempt to abate the obstruction and use the way. In *Rose* v. *Miles* (7) the plaintiff was obstructed in his use of the navigable water, and was damaged by being obliged to unload his barge and carry the goods overland. In all these cases the plaintiff was exercising his right of way and the defendant obstructed that exercise and caused particular damage thereby directly and immediately to the plaintiff." In *Iveson* v. *Moore* (2) the decision of Holt C.J. against the right of action, as reported in Lord Raymond's Reports, was subsequently reversed by the judges of the Common Pleas and Exchequer sitting in Serjeant's Inn. The cases under the Lands Clauses Consolidation Act, relevant for the reason already stated, I find it very difficult to reconcile. Lord Blackburn in *Caledonian Ry. Co.* v. *Walker's Trustees* (8) goes through them in a way which relieves me of the necessity of referring to them in detail. He comes to the conclusion, as I understand his

(1) T. Jones, 156.
(2) 1 Ld. Raym. 486.
(3) (1599) 2 Cro. Eliz. 664.
(4) 2 Bing. 263.
(5) (1691) Carth. 191.
(6) Willes, 71.
(7) 4 M. & S. 101.
(8) 7 App. Cas. 259.

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judgment, that the decisions of the House of Lords in *Caledonian Ry. Co.* v. *Ogilvy* (1) and in *Ricket's* case (2) are not consistent with the decisions in *McCarthy's* case (3), approving *Beckett's* case (4), and therefore he follows "the later and more deliberate decision" (5), that is, *McCarthy's* case. (3) The House of Lords in the *Caledonian Ry. Co.* v. *Walker's Trustees* (6), following *McCarthy's* case (3), did allow the claimant under the Lands Clauses Consolidation Act to recover compensation, and therefore decided that the matter of which he complained would have given him a cause of action for particular damage before the Act authorizing it was passed. Now the plaintiff there complained of the closing of a public highway and substituting for it a lengthier road of a steeper gradient than the way closed, whereby the access to his house was injured. This decision appears to me to support the conclusion I have arrived at in the cases decided independently of the Lands Clauses Consolidation Act.

The result is that the legal objections to the plaintiffs' recovering damages for delay in reconstruction fail. The claim for damages for negligence before reconstruction fails, as in my opinion there is no evidence on which the jury could find negligence before the collapse of the lock; but the plaintiffs are entitled to damages for unjustifiable delay in commencing the reconstruction of the lock after its collapse.

But besides claiming damages for breach of the statutory duty, the plaintiffs added a claim for breach of agreement to repair the navigation. [The Lord Justice, after reciting the pleadings and reviewing the evidence, continued :]

On this part of the case therefore I am of opinion that there was no evidence on which any claim for damages for failing to repair could be based on an agreement in December, 1927, and further that, if there was any general agreement, it was too vague to be enforced, and if there was an agreement to use reasonable care to repair, there was no breach of it for the reasons already stated.

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(1) (1856) 2 Macq. 229.

(2) L. R. 2 H. L. 175.

(3) L. R. 7 H. L. 243.

(4) L. R. 3 C. P. 82.

(5) 7 App. Cas. 302.

(6) 7 App. Cas. 259.

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The result is that the judgment must be set aside except so far as it gives the plaintiffs judgment for damages for the four months' delay in commencing reconstruction, which I understand is referred to a special referee. As to costs, considering the number of matters on which the plaintiffs have failed and are liable for the costs of their failure, I think the simplest order which will do justice and save the very considerable expense of a complicated subsequent taxation is that there should be no costs to date of the action or the appeal, but that the costs of the inquiry as to damages before the special referee be referred to him. The defendants may be advised to make a payment into Court.

GREER L.J. I have arrived at a similar conclusion for similar though not identical reasons. I should have been very glad if the practice of this Court had permitted me to say: "I have arrived at the same conclusions for reasons which I have stated in the judgment which I will hand to the reporter," but that is not in accordance with the practice of this Court, and, unfortunately, I must read my judgment.

The claim of the plaintiffs in this case may be shortly stated as follows: First, a claim for damages for breach of an oral contract between the parties made at an interview on December 8, 1927, whereby the defendants undertook to do what was necessary to put the Ure Navigation and especially the Milby Lock into repair. Secondly, an alternative claim for damages for breach of the duty imposed on the defendants by s. 36 of the Leeds and Thirsk Railway Act, 1845: "to keep and maintain the said River Ure and the Cuts and Canals and all the works thereto belonging and every part thereof respectively in good order and condition, ... so that they and every part thereof should be kept open and navigable for the use of all persons desirous to use and navigate the same and that without any unnecessary hindrance, interruption and delay." Thirdly, in any event, damages for unnecessary delay in rebuilding the lock after they had closed it to traffic for the purpose of repair or rebuilding. At the trial and on this appeal the case for the plaintiff was confined to the alleged breaches of duty relating to that part of the navigation known as the Milby Lock. The case was tried before Hawke J. and a jury. Certain questions, which Scrutton L.J. has read, were submitted to the jury, who answered all of them in a manner favourable to the plaintiffs' claim, and the judge gave judgment for the plaintiffs, the amount of the damages being referred to be assessed by Mr. Mitchell-Innes K.C.

The defendants appeal from this judgment on grounds that may be conveniently stated as follows: First, that there was no evidence that the contract alleged in para. 7 of the statement of claim was made by the defendants with the plaintiffs on December 8, 1927; secondly, that there was no evidence that the defendants held out the officials present on December 8, 1927, as having authority to make the contract; thirdly, that there was no evidence on which it could be held that the defendants were estopped by the facts pleaded and proved in evidence from denying that the said officials had the alleged authority.

With regard to the claim based on breach of statutory duty the defendants contended: first, that there was no evidence of any breach by the defendants of their statutory duty; secondly, that the duty was a public duty, similar to the duty to repair highways, and the defendants were not liable to pay damages to any individual claimant for nonfeasance; thirdly, that in any event they could only be sued for breach of their statutory duty by those who could prove special or peculiar damage beyond what was suffered by the general public, and the plaintiffs had failed to give evidence of any such damage.

As to the contract: [The Lord Justice went on to hold, in favour of the appellants, (1.) that there was no evidence that the alleged contract had been made; (2.) that the officers of the appellants, who were alleged to have made the contract, had no authority actual or ostensible to make it, and (3.) that the appellants were in no way estopped from denying their authority.]

The question involved in the claim for damages for breach of statutory duty is one of considerable difficulty, and it is not easy to reconcile the numerous decisions on the subject. Inasmuch as the answers to the eighth, ninth and tenth questions were necessary to determine whether the defendants are liable to pay damages in respect of the four months' delay caused by their alleged negligence in not commencing or completing the work after the lock was closed, it is necessary for this Court to deal with the points raised in those answers.

It was rightly admitted that the defendants' statutory duty to keep the lock in repair was not an absolute duty: see *Hammond* v. *Vestry of St. Pancras* (1) and per Lord Alverstone C.J. in *Lambert* v. *Lowestoft Corporation.* (2) Their duty was to exercise reasonable care to keep and maintain the lock in good order and condition, so that it should at all times be kept open and navigable for the use of all persons desiring to use and navigate the same without any unnecessary hindrance, interruption or delay. It is established by the evidence of Mr. Silcock, one of the experts put forward by the plaintiffs, and therefore vouched by them as an expert to be relied on, that the collapse of the lock could not have been prevented by any work that would have taken less time than reconstruction.

The question then arises whether the defendants were negligent in not reconstructing earlier than they did. As long as the lock was capable of doing its work it was unnecessary to close it. In my judgment, as nothing but reconstruction would avail, it was not negligence to postpone reconstruction as long as it could be safely postponed. Reconstruction would interrupt the navigation as long at one time as at another. Indeed, the longer it was postponed the shorter time it was likely to take, as contractors' machinery and methods of work undoubtedly improve from time to time. In my judgment there was no evidence on which the defendants could be held liable for the delay in deciding to close the lock for

(1) (1874) L. R. 9 C. P. 316.

(2) [1901] 1 K. B. 590, 594.

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reconstruction; there was no evidence entitling the jury to answer questions one and two in the affirmative; and if the defendants had discovered the cause of subsidence earlier than they did it would still have been prudent to postpone the closing of the lock.

It remains for me to consider whether the plaintiffs are entitled to damages on the ground that the defendants were guilty of negligence in that they took four months longer to do the work than was reasonably necessary. There was evidence on which the jury could so find. Two contentions were put forward by the appellants as an answer to this as well as to the larger claim, and it is necessary to deal with them: (1.) They contended that the statutory duty to repair is a public duty, and that they could not be sued for damages arising from a breach of their duty to the public. They argued that the freedom from liability for nonfeasance of statutory highway authorities was not peculiar to highway authorities, but applied to all cases where the duty imposed by the relevant statute was a duty to the public generally; that the duty to keep the Ure navigation in repair was a duty imposed for the benefit of "all persons desirous to use and navigate the same"; see 8 & 9 Vict. c. civ., s. 36; just as the duty to repair the roads in any district is a duty to all persons who desire to use the roads. They relied in support of their contention on cases like *Cowley* v. *Newmarket Local Board* (1); *Glossop* v. *Heston and Isleworth Local Board* (2) and *Hesketh* v. *Birmingham Corporation.* (3) It may well be that where a duty is imposed on public non-trading corporations they cannot be made liable to individual citizens or ratepayers for damages arising from their failure to carry out their statutory duties, and that the only remedy in such cases is by indictment or mandamus, or by some special proceedings provided for by the statute creating the duty. But it is too late to apply any such rule to the breaches of duty by canal companies, railway companies, or dock companies. The decisions in *Parnaby* v. *Lancaster Canal Co.* (4); *Mersey*

(1) [1892] A. C. 345.
(2) (1879) 12 Ch. D. 102.
(3) [1924] 1 K. B. 260.
(4) 11 Ad. & E. 223.

Docks Trustees v. *Gibbs* (1), and *Boynton* v. *Ancholme Drainage and Navigation Commissioners* (2) in this Court, are all cases in which it was held that failure to perform a statutory duty by a company taking tolls for its services rendered them liable to pay damages to persons who suffered special damage as a result of the company's breach of their statutory duty.

It was further contended for the defendants that the damage claimed by the plaintiffs was not special or peculiar damage within the meaning of the cases which have laid down that a plaintiff cannot recover for a breach of a public duty unless he can establish that he has suffered "special" or "peculiar" or "private" damage. The cases on this subject are not very easy to reconcile. But in my judgment the weight of authority is in favour of the view that the plaintiffs' losses, through their inability to use the canal for delivering their goods to their customers at places beyond Milby Lock, and the greater expense they incurred in sending them by road or rail, are special damages which they are entitled to recover for the defendants' breach of their public duty. If it be proved that a defendant has by his acts or unlawful omissions been guilty of a breach of any right which is the private or personal right of a plaintiff, such a defendant is of course clearly liable to pay damages to the plaintiff. If, on the other hand, the acts or omissions alleged are in derogation of rights which the plaintiff has in common with all His Majesty's subjects who have occasion to exercise those rights, the plaintiff has no remedy by an action for damages, unless he can establish that he has suffered special or peculiar damage beyond what is suffered by the rest of His Majesty's subjects. What amounts to such special or peculiar damage is a question of some difficulty, but happily it is not necessary in this case to give a complete definition of the word "special" or "peculiar" damage in this connection. There is ample authority for the proposition that if a trader whose premises adjoin a highway is in the habit of using the highway for the purposes of his trade and suffers damage to his business by the defendant's action in unlawfully obstructing the highway,

(1) L. R. 1 H. L. 93.

(2) [1921] 2 K. B. 213.

the damage to his business is special damage which he is entitled to recover by action against the person so infringing the public rights. In *Iveson* v. *Moore* (1) the material facts alleged in the pleading which were held to give a right of action were, that on May 14, the plaintiff had 200 loads of coal dug out of a colliery, and that for a whole month he was prevented from taking the coal in his carts to his customers. Two judges held that the action was well laid and two thought it was not. On appeal to the Court of Exchequer Chamber it was unanimously held that the plaintiff was entitled to succeed. (2) It does not appear from the report that the plaintiff's carts had been actually taken as far as the obstruction and were then unable to get through. It seems to me that the case means that at any rate where a colliery company has coal ready to be taken over the highway for the purposes of sale or delivery to customers, and where the highway is obstructed so that this cannot be done, the company is entitled to damages without proving that they had their coals actually on the highway and there met with the obstruction. In the judgment of Gould J. the decision in *Baker* v. *Moore* (3) is stated to the effect that the owner of property could recover damages on the ground that a highway which was the approach to some of his houses had been obstructed, with the result that he lost his tenants. In *Hart* v. *Basset* (4) it was held that the defendant, who had obstructed and stopped up the most convenient highway for the plaintiff to carry his tithes to his barn, whereby he was compelled to take them by a longer and more difficult way and incurred expense thereby, was liable. This was held to be particular damage occasioned to the plaintiff by a breach of public rights. *Greasly* v. *Codling* (5) is a case where a plaintiff wanted to use a highway—obstructed by the defendant—for the purpose of carrying coals and, by reason of the obstruction, had to go by a longer way, so that he was damaged by being unable to make the same number of

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(1) 1 Ld. Raym. 486.

(2) See 1 Ld. Raym. 495; 12 Mod. 267.

(3) (1696) cited 1 Ld. Raym. 491.

(4) T. Jones, 156.

(5) 2 Bing. 263.

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journeys per day; and there it was held that the plaintiff could recover without having in any other respect proved special damage. In the judgment of Burrough J. the question is stated to be whether the inconvenience complained of is general or is a particular inconvenience of the party complaining. In *Chichester* v. *Lethbridge* (1) it was held that a plaintiff, proving that the defendant obstructed him by a ditch and a gate across a highway whereby he was obliged to go a longer and more difficult way, and that the defendant opposed him when attempting to remove the nuisance, was entitled to succeed. In *Rose* v. *Miles* (2) it was held that a plaintiff who had his barges stopped by an obstruction in a waterway by the defendant, and had therefore to take the loads out of the barges and send them by road at greater expense, had suffered special damage, which entitled him to recover. In this case he appears to have been actually prevented from taking the barges through, but it hardly seems possible to think that there would have been any difference in the result of the action if, instead of taking the barges up to the obstruction, he had them ready but did not take them, because he knew that the obstruction was there and would not be removed. In *Wilkes* v. *Hungerford Market Co.* (3) it was held that the defendants, who had obstructed a highway for a longer period than was justified by their statutory powers, were liable to pay damages to a bookseller whose shop adjoined the highway, and who proved loss of custom due to the unauthorized obstruction. In *Ricket* v. *Metropolitan Ry. Co.* (4) Lord Chelmsford in the course of his speech throws grave doubt on the correctness of the decision in *Wilkes* v. *Hungerford Market Co.* (3), but I do not think it can be said to have been overruled, and it is in accord with the earlier authorities to which I have referred, and having regard to the subsequent decision of the House of Lords in *Metropolitan Board of Works* v. *McCarthy* (5) I think it ought to be regarded as correctly decided. If the diminution in value of business premises due to an unauthorized obstruction gives the owner a good cause of action, it seems to me that the interference with his business which gave rise to the loss of business earnings ought a fortiori to be regarded as particular damage giving him a cause of action. These cases would afford ample authority for the decision in the plaintiffs' favour of the point under consideration. They from time to time during part of the relevant period loaded their barges, took them as far as the lock, and, as they could not take them any further, transferred them to rail at great expense. In addition to that they may be able to prove that they were unable to take considerable quantities of gravel, which they had or could have had ready to put upon their barges, to customers who could only be, or could only conveniently be, reached by navigation below lock.

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(1) Willes, 71.
(2) 4 M. & S. 101.
(3) 2 Bing. N. C. 281.
(4) L. R. 2 H. L. 175.
(5) L. R. 7 H. L. 243.

But it is said that there are modern cases which establish that the damage that the plaintiffs claim is not special or peculiar. In the case of *Winterbottom* v. *Lord Derby* (1), where the plaintiff proved that by reason of the defendant obstructing a public footpath he had incurred expense in removing the obstruction, it was held that he had not suffered such damage as entitled him to recover for the breach of the public rights. Kelly C.B. treats the question as if it were whether the plaintiff had suffered anything more than an inconvenience common to all who happened to pass that way, and in the course of his judgment he says (2): "I am of opinion that the true principle is, that he and he only can maintain an action for an obstruction who has sustained some damage peculiar to himself, his trade, or calling"; and Channell B. says (3): "The plaintiff cannot maintain this action without showing that he has suffered damage beyond and in excess of what other people have suffered." Assuming that these tests are correct, it seems clear that the plaintiffs in the present case have suffered some damage peculiar to them in their trade or calling, or, to use the words of Channell B., have "suffered damage beyond and

(1) L. R. 2 Ex. 316.
(2) L. R. 2 Ex. 322.
(3) L. R. 2 Ex. 323.

in excess of what other people have suffered." Whether the law was rightly or wrongly applied in this case it is unnecessary to determine, because even if it be good law, it is no authority against the plaintiffs' right to succeed in the present case. The decision mainly relied upon by the appellants on this part of their argument was the case of *Ricket* v. *Metropolitan Ry. Co.* (1) In that case the plaintiff claimed compensation under the Railways Clauses Consolidation Act, 1845, because he said his property had been injuriously affected. He was the owner of an inn, the access to which had been made more inconvenient for his customers by that which would have been an unlawful obstruction to a highway if it had not been authorized by the company's statutes. It has long been well established law that in order to be entitled to compensation under the Railways Clauses Act or the Lands Clauses Act it must be proved that, but for the statutory authority to do the act in respect of which compensation is claimed, the claimant would be entitled to damages at common law. In *Ricket's* case (1) it was held, first, that the plaintiff claiming compensation had not suffered any peculiar damage which would have entitled him to succeed in an action for damages at common law; and secondly, that in any event he had not proved that his land was injuriously affected. It is difficult to reconcile this case with the decision of the Court of Common Pleas in the case of *Beckett* v. *Midland Ry. Co.* (2), which was approved by the House of Lords in *Metropolitan Board of Works* v. *McCarthy* (3), or with the decision of the House of Lords in the last named case; but, be this as it may, *Ricket's* case (1) is not an authority against the plaintiff's claim in the present case. In *Ricket's* case (1), what the plaintiff had to establish was, first, that his property was injuriously affected; and secondly, that the damage occasioned to him by the injurious affection of his land was such as he could have recovered at common law, and it may well be that the true explanation of that decision is that it does not involve any decision that

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(1) L. R. 2 H. L. 175.
(2) L. R. 3 C. P. 82.
(3) L. R. 7 H. L. 243.

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he could not have recovered at common law for the damage to his trade by reason of the obstruction, but that the damage to his property by reason of the obstruction was too remote to be taken into account as special damage caused by the obstruction. The question whether he could have recovered for damage to his trade was not material to the decision in that case—the question being whether he could have recovered for damage to his property. As I have said, it is difficult to reconcile all the words used in the speeches in the two cases in the House of Lords. In *McCarthy's* case (1) it was decided that the diminished value of the plaintiff's property was the direct consequence of the taking away of the draw-dock, and that he could not but for that fact have recovered this damage—namely, the damage to his property—as peculiar and special damage occasioned to him by breach of the public rights. As I have said, it is difficult to reconcile this decision with that in *Ricket's* case (2) except on the ground that no diminution in value of the public house was in fact proved in *Ricket's* case (2), or that on the special facts of that case any diminished value of the plaintiff's public house was too remote a consequence of the defendants' partial obstruction of the highway, whereas the diminution in value of the plaintiff's property was proved in *McCarthy's* case (1) to be the direct and immediate result of the closing of the dock. In my judgment it is the law that where a plaintiff has property near a highway which he uses for the purposes of his business, and the highway, whether a canal or a roadway, is unlawfully obstructed, and he is thereby put to greater expense in the conduct of his business, or suffers loss by the diminution of his business, he is entitled to recover damages as a person who has suffered special or peculiar damage beyond that which has been suffered by other members of the public wanting to use the highway or waterway.

For these reasons I think the appeal should be allowed, and the judgment varied by ordering that the inquiry as to

(1) L. R. 7 H. L. 243.

(2) L. R. 2 H. L. 175.

damages be limited to damages occasioned by the four months' delay in rebuilding the lock, and that the order as to costs should be as stated by my Lord.

Slesser L.J. In this action the plaintiffs' claim in substance is for damages suffered by them consequent upon the negligent breach of statutory duty by the defendants, the London and North Eastern Ry. Co., in relation to the keeping and maintenance of a lock on a canal owned by the Railway Company known as the River Ure Navigation, or alternatively for damage suffered by the plaintiffs in relation to the keeping and maintenance of the lock in breach of an alleged agreement between the plaintiffs and the defendants. Certain other damage and relief was originally claimed, but at the trial the issues became limited to the matters above stated. The case was tried before Hawke J. and a special jury and, in the result, judgment was given against the Railway Company for damages to be assessed. The jury having found a breach of a contract by the Railway Company to do what was necessary to put the canal and lock into repair, Hawke J. after hearing legal argument declined to give judgment on the ground of breach of statutory duty, inasmuch as the jury had found for the plaintiff on the issue of contract. In my view, however, so much of the appeal as contends that there was no evidence on which the jury could properly come to the conclusion that an oral and enforceable agreement was made on December 8, 1927, is well founded. The defendants denied altogether the making of such an agreement, and the evidence of the plaintiffs, which I have carefully considered, is of so vague a character and its terms both as to duration and incident are so uncertain that, for the reasons stated by my brothers, which I do not repeat, I think that the alleged contract is unenforceable for uncertainty. I am unable to find the terms of such an agreement, and an agreement is not a contract unless its terms are certain or can be made certain: see Pollock on Contracts, 9th ed. (1921), p. 48, and the cases there cited. If there be any doubt on this head of agreement it is only

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necessary to add that, on the evidence and admissions, the gentlemen who are alleged to have made it on behalf of the Railway Company had no authority to make it, nor does the evidence show that the Railway Company ever held them out as having any such authority. The plea of estoppel is also not maintainable. This disposes of any right of action founded upon breach of contract.

I come, therefore, to the other basis of claim, that of a breach of statutory duty, which was the sole ground originally pleaded by the plaintiffs. The statutory obligations on the defendant Company are to be found in two Acts of Parliament in practically identical terms so far as the matters here material are concerned. The first is the Leeds and Thirsk Railway Act, 1845, s. 36, and the second, the Railway and Canal Traffic Act, 1873, s. 17. Inasmuch as the argument in the Court below and the pleadings appear only to refer to the earlier Act, I quote the material section from that Act. It is as follows: [The Lord Justice read s. 36 of the Leeds and Thirsk Railway Act, 1845, set out above, and proceeded:] The language of this section and of the corresponding section of the Act of 1873 makes it clear that this is not a case where there is imposed an absolute duty to keep the canal repaired at all events, but only a duty of using all reasonable care and diligence. This distinction, which is vital to the determination of the degree of liability imposed by statute, is made very clear in the case of *Hammond* v. *Vestry of St. Pancras.* (1) There a question arose concerning the liability of a vestry under the Metropolis Local Management Act, 1854, for an injury resulting to an individual from the disrepair of a sewer. The material language of s. 72 of the Act of 1854 is that: "Every vestry . . . . shall cause the sewers vested in them to be constructed, covered, and kept so as not to be a nuisance or injurious to health, and to be properly cleared, cleansed, and emptied"—language no less onerous than that in the Canal Acts. Brett J. (afterwards Lord Esher) said (2): "The question therefore is, what is the proper construction of the Act of Parliament? That, as it seems to me, will dispose of both points; for, both turn upon the construction of s. 72. The declaration does not charge the defendants with having been guilty of negligence. It discloses no common law liability in the defendants, and can only be a valid declaration if it can be supported upon the statute. The words of s. 72 are susceptible of either meaning—that an absolute duty is cast upon the defendants, or that they are only bound to exercise due and reasonable care. What, then, is the proper rule of interpretation? The defendants are a public body having a duty imposed upon them by Parliament to do a thing which even with the exercise of the utmost care and diligence may not always be capable of being done. . . . . It would seem to me to be contrary to natural justice to say that Parliament intended to impose upon a public body a liability for a thing which no reasonable care and skill could obviate. The duty may notwithstanding be absolute; but, if so, it ought to be imposed in the clearest possible terms. The intention of the legislature is to be gathered from the language used and the subject-matter. Where the language used is consistent with either view, it ought not to be so construed as to inflict a liability, unless the party sought to be charged has been wanting in the exercise of due and reasonable care in the performance of the duty imposed. According to my view of s. 72, therefore, the vestry or district board are not to be held liable for not keeping their sewers cleansed at all events and under all circumstances; but only where by the exercise of reasonable care and diligence they can and ought to know that they require cleansing, and where by the exercise of reasonable care and skill they can be kept cleansed."

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(1) L. R. 9 C. P. 316.

(2) L. R. 9 C. P. 322.

There is much other authority to support the view that, where a statute does not in terms impose upon a public body an absolute duty, it is necessary to show negligence or want of reasonable care if the plaintiff is to succeed. In the leading case of *Mersey Docks Trustees* v. *Gibbs* (1) Lord Cranworth L.C. says: "Where such a body is constituted by statute, having the right to levy tolls for its own profits, in consideration of making and maintaining a dock or a canal, there is no doubt of the liability to make good to the persons using it any damage occasioned by neglect in not keeping the works in proper repair. This was decided by the Court of Queen's Bench, and the decision was affirmed in the Court of Error in the case of *Parnaby* v. *Lancaster Canal Co.* (1) The ground on which the Court of Error rested the decision in that case, is stated by Tindal C.J. to have been that defendants there, who constituted the company, made the canal for their profit, and opened it to the public upon the payment of tolls. And the common law in such a case imposes a duty upon the proprietors to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may do so without danger to their lives or property." Lord Alverstone C.J. in *Lambert* v. *Lowestoft Corporation* (2) states the matter positively thus: "It is now clearly established that under ordinary circumstances no action lies for injury occasioned by the execution of a statutory duty unless it has been negligently performed: *Geddis* v. *Proprietors of Bann Reservoir* (3); *Bateman* v. *Poplar Board of Works* (4); *Thompson* v. *Mayor of Brighton* (5); *Stretton's Derby Brewery Co.* v. *Derby Corporation* (6), and many other cases." Finally on this head: "An action upon the case does not lie where a man has not sufficient notice of his duty": Com. Dig., "Action upon the case for Misfeasance" (B).

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(1) L. R. 1 H. L. 93, 122.

Sect. 36 of the Leeds and Thirsk Railway Act (from which through other statutes the Railway Company derive their title to the canal and their rights and duties) contains two obligations; first, to keep every part of the canal well and sufficiently repaired and in good order and condition, and secondly, to keep it open and navigable for the use of all persons desirous to use and navigate the same without any unnecessary himdrance or delay. The jury have found as to the duty arising on the first limb of the section, that the defendants before 1928 negligently failed to take proper steps for the maintenance and repair of Milby Lock and that the taking of such proper steps would have prevented the closing of the lock—a thing which happened in December, 1928—and as to the duty, on the second limb, that they caused unnecessary delay or hindrance in reconstructing Milby Lock by four months.

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(1) 11 A. & E. 223.
(2) [1901] 1 K. B. 590, 594.
(3) (1878) 3 App. Cas. 430, 455.
(4) (1887) 37 Ch. D. 272.
(5) [1894] 1 Q. B. 332.
(6) [1894] 1 Ch. 431.

The finding as to the first duty is a finding of negligence in performance of the obligation cast upon the defendants which, if maintainable on the evidence, would amount to a finding of a breach of their statutory duty. But I have come to the conclusion for the reasons given by Scrutton L.J. in his judgment, which I need not repeat because of my precise agreement with them, that there is no evidence on which the jury could properly so find and, consequently, for failure to show reasonable care on the part of the defendant Company in the repair of the lock, the plaintiffs are unable to maintain their allegation of breach of the first statutory duty and so cannot succeed on this part of their case.

There remains the second finding, of failure to perform the statutory duty on the second limb, "to keep open and navigable the canal without unnecessary hindrance, interruption or delay." Again I find myself in agreement with Scrutton L.J., that there was evidence on which the jury were entitled to find that four months' delay had been negligently caused. The defendants themselves conceded, as I understand them, two months' unnecessary delay. But even on this finding of negligence in failure to comply with the latter limb of s. 36, it was nevertheless for other reasons objected that the plaintiffs could not succeed, first, because the defendants were so sufficiently similar to a highway authority that, under the decisions relating to such authorities, they would only be liable for misfeasance and not for nonfeasance; and secondly, that in any event the plaintiffs could not show that they had suffered such sufficient or particular special damage, beyond that incurred by the public at large, as to enable them to sue.

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As to the first contention based on the analogy of highway authorities, *Parnaby* v. *Lancaster Canal Co.* (1), and the specific reference to the liability of canals in *Mersey Docks Trustees* v. *Gibbs* (2) make it unnecessary to enter into an examination of the highway cases or to speculate whether the immunity conferred on the surveyor of highways arises out of a desire to avoid multiplicity of actions, or from inability to sue inhabitants at large, or for any other reason. In the *Mersey Docks Trustees*' case (3) Lord Cranworth L.C. says: "Where such a body is constituted by statute, having the right to levy tolls for its own profits, in consideration of making or maintaining a dock or a canal, there is no doubt of the liability to make good to the persons using it any damage occasioned by neglect in not keeping the works in good repair." This point, in my view, has been definitely decided against the defendants in *Parnaby's* case (1), as approved by the House of Lords in *Mersey Docks Trustees* v. *Gibbs.* (2)

The second defence on this head, that the plaintiffs have failed to show particular and special damage, is more difficult. I do not think it necessary in the present case to attempt to reconcile such cases as *Iveson* v. *Moore* (4) (in which it was held, according to Willes' Reports (5), that on the matter being reserved for the opinion of the rest of the judges they agreed in the opinion of Turton and Gould JJ., that an action lay upon proof of special damage more than that suffered by the rest of the King's subjects by the obstruction of a way which was the only way to come to the coal pits of the plaintiff) and *Wilkes* v. *Hungerford Market Co.* (6) (where a bookseller suffered loss in business in consequence of passengers having been diverted from the thoroughfare by the defendants continuing an unauthorized obstruction across it for an unreasonable time) on the one hand, and the disapproval of these cases by the majority of the House of Lords in *Ricket* v. *Metropolitan Ry. Co.* (7) Despite the fact that

(1) 11 Ad. & E. 223.
(2) L. R. 1 H. L. 93.
(3) L. R. 1 H. L. 122.
(4) 1 Ld. Raym. 486.
(5) Willes, 74.
(6) 2 Bing. N. C. 281
(7) L. R. 2 H. L. 175.

Ricket's case (1) turned essentially on the Lands Clauses and Railway Clauses Act, it would certainly appear, according to Willes J. in *Beckett* v. *Midland Ry. Co.* (2), that *Wilkes* v. *Hungerford Market Co.* (3) must now be regarded as overruled. See also per Kennedy J. in *Martin* v. *London County Council.* (4) I prefer to base my judgment here on the fact that this canal is not a public highway, and, though a "free navigation," is also a navigation for using which the plaintiffs paid tolls and in respect of which any argument based upon an unconditional general right of the public does not apply; for, though the language of the Canal Acts speaks of the whole of such canal being kept open and navigable for the use of all persons desirous to use and navigate the same, yet, as I think is indicated by the opinion of the judges expressed by Blackburn J. in the *Mersey Docks Trustees'* case (5), the defendants in the present action are not servants of the public in the sense that a surveyor of highways is. Such an officer may well not be responsible to a person sustaining injury from the parish ways being out of repair, but other authorities may be in a different position. Even before the decision in the *Mersey Docks Trustees'* case (6) companies working a canal were held liable as commercial adventurers trading for profit: see Beven on Negligence, vol. i., 4th ed., p. 365. Further authority for the conclusion that the plaintiffs have here shown particular damage may be found in the case of *Rose* v. *Miles.* (7) There the plaintiff declared that before and at the time of committing the grievance he was navigating his barges laden with goods along a public navigable creek, and that defendant wrongfully moored a barge across and kept the same so moored from thence hitherto, and thereby obstructed the public navigable creek, and prevented the plaintiff from navigating his barges so laden, per quod the plaintiff was obliged to convey his goods a great distance over land, and was put to trouble and expense in the carriage of his goods over land.

(1) L. R. 2 H. L. 175.
(2) L. R. 3 C. P. 82.
(3) 2 Bing. N. C. 281.
(4) (1898) 14 Times L. R. 575.
(5) L. R. 1 H. L. 111.
(6) L. R. 1 H. L. 93.
(7) 4 M. & S. 101.

Thus the facts were very similar as regards the damage to the plaintiff, though the cause of the damage was different from that in the present case. It was held that there was such a special damage that an action upon the case would lie. Lord Ellenborough C.J. said (1): "The plaintiff was in the occupation, if I may say so, of the navigation; he had commenced his course upon it, and was in the act of using it when he is obstructed." Bayley J. said (2): "The defendants in effect have locked up the plaintiff's craft whilst navigating the creek, and placed him in a situation that he unavoidably must incur expense in order to convey his goods another way." The case of *Rose* v. *Miles* (3) was cited by counsel for the plaintiff in *Ricket's* case (4), and although the House threw doubt upon the decision in *Wilkes* v. *Hungerford Market Co.* (5) and inferentially on *Iveson* v. *Moore* (6), no criticism was made of the case of *Rose* v. *Miles* (3), which appears to me to be good law. The case of the *Mayor of Lyme Regis* v. *Henley* (7) decided that where letters patent bound the Mayor and Burgesses to repair the banks and seashore an action would lie by an individual for direct and particular damage suffered by him. Park J., delivering the opinion of the judges for the consideration of the House of Lords, pointed out (8) that the King in granting the charter had remitted part of an ancient rent, and that this showed consideration for the grant. In *Ruck* v. *Williams* (9) the Commissioners for improving the Town of Cheltenham under an Act of Parliament neglected to put a flap over an old sewer, whereby water flowed from the new sewer back into the old one and caused damage to the plaintiff. It was argued that the Commissioners were not liable to action for nonfeasance. Martin B. held that if the Commissioners thought proper to make a new sewer communicating with the plaintiff's premises and omitted to give him the protection he had before, and there was damage immediate and consequent upon it, there was such damage or negligence as to entitle him to maintain this action. In every case the liability of a body created by statute must be determined upon a true interpretation of the statute under which it is created: (per Lord Campbell C.J. in *Southampton and Itchin Bridge Co.* v. *Southampton Local Board.* (1) Finally Blackburn J. in the *Mersey Docks Trustees'* case points out (2) that: "It is obvious that a shipowner who pays dock rates for the use of the dock, or the owner of goods who pays warehouse rates for the use of a warehouse and the services of the warehousemen, is, as far as he is concerned, exactly in the same position, however the rates may be appropriated. He pays the rates for the dock accommodation, or for warehouse accommodation and services, and he is entitled to expect that reasonable care should be taken that he shall not be exposed to danger in using the accommodation for which he has paid."

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(1) 4 M. & S. 103.
(2) 4 M. & S. 104.
(3) 4 M. & S. 101.
(4) L. R. 2 H. L. 178.
(5) 2 Bing. N. C. 281.
(6) 1 Ld. Raym. 486.
(7) (1834) 2 Cl. & F. 331.
(8) 2 Cl. & F. 349.
(9) (1858) 3 H. & N. 308.

In my opinion there is evidence that, through the defendants' failing to repair within a reasonable time as found by the jury, the plaintiffs have suffered direct special and particular loss. Their barges which were upon the canal were immobilized and their business interfered with by reason of the fact that the method of the conveyance of their gravel on which they had relied, and for which they had paid tolls and were prepared in the future to pay tolls, was denied to them. They are, therefore, entitled to succeed on this part of their claim and, for the reasons I have above stated, on this part only.

I agree, therefore, that this appeal should be allowed to the extent and subject to the qualifications and terms stated by Scrutton L.J.

Appeal allowed except upon the issue of delay.

Solicitor for appellants: *I. B. Pritchard.*

Solicitors for respondents: *Steavenson & Couldwell, for Smithson, Teasdale & Hewitt, York.*

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(1) (1858) 8 E. & B. 801, 812.

(2) L. R. 1 H. L. 93, 107.

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MANSON (INSPECTOR OF TAXES) *v.* WESLEY.

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May 15, 18.

Revenue—Income Tax—Permanent Discontinuance of Business—Additional Assessment for Year preceding the Discontinuance—Mode of Computation—Finance Act, 1926 (16 *&* 17 *Geo.* 5, *c.* 22), *ss.* 29, 31, *sub-s.* 1 (*b*); *s.* 34, *sub-s.* 1 (*a*); *s.* 35.

The Finance Act, 1926, which by s. 29, sub-s. 1, made the profits or gains of a business assessable on the profits or gains of the year preceding the year of assessment instead of on the average profits or gains of the three preceding years, provides:—

Sect. 31, sub-s. 1: "Where in any year of assessment a trade, profession or vocation is permanently discontinued, then, ... (*b*) if the profits or gains of the year ending on the fifth day of April in the year preceding the year of assessment in which the discontinuance occurs exceed the amount on which the person has been charged for that preceding year, ... an additional assessment may be made upon him, so that he shall be charged for that preceding year on the amount of the profits or gains of the said year ending on the fifth day of April. . . . ."

Sect. 34, sub-s. 1: "Where in the case of any trade, profession or vocation, ... it has been customary to make up accounts,—(*a*) if only one account was made up to a date within the year preceding the year of assessment, and that account was for a period of one year, the profits or gains of the year ending on that date shall be taken to be the profits or gains of the year preceding the year of assessment":

Held (1.), that the computation of "the profits or gains of the year ending on the fifth day of April in the year preceding the year of assessment in which the discontinuance occurs" for the purposes of an additional assessment under s. 31, sub-s. 1 (*b*), could not be made by resort to s. 34, sub-s. 1, as the profits or gains to be ascertained were not the profits or gains in the year preceding the year of assessment, but the profits or gains in the year to which the additional assessment related.

(2.) That in ascertaining these profits there was in a case when the annual accounts of the business were made up to a date other than April 5, no need for a fresh account, but the profits would be ascertained by an apportionment under s. 35 of the Act.

Decision of Rowlatt J. reversed.

APPEAL from a decision of Rowlatt J. on a Case stated under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on November 22, 1929, for the purpose of hearing appeals, Harold Wesley (hereinafter called "the respondent") appealed against an additional assessment to income tax in the sum of 8102*l.* for the year ending April 5, 1928, made upon him by the Additional Commissioners of Income Tax for the Division of Kensington under the provisions of the Income Tax Acts.

The respondent had for some years carried on the business of a manufacturing stationer. On July 2, 1928, he sold this business to a private limited company (hereinafter referred to as "the company"), in which all the shares were held by the respondent or members of his family.

It had been customary to make up the accounts of the said business annually to June 30 in each year. The account for the year ending June 30, 1926, showed a profit of 6898*l.*, and the account for the year ending June 30, 1927, a profit of 11,025*l.* Notwithstanding the change of ownership of the business, one account was made up for the whole year ending June 30, 1928, and this account showed a profit of 15,889*l.*

The respondent had originally been assessed to income tax for the year ending April 5, 1928, in the sum of 6898*l.*, being the amount of the profit shown by the account for the year ending June 30, 1926, in accordance with the provisions of s. 29, sub-s. 1, and s. 34, sub-s. 1 (*a*), of the Finance Act, 1926.

For the year ending April 5, 1929, the respondent was primarily assessable under the same provisions in the sum of 11,025*l.*, being the amount of the profits shown by the account for the year ending June 30, 1927, but as the company succeeded to the trade after April 5, 1928, sub-r. 2 of r. 11 of the Rules applicable to Cases I. and II. of Sch. D, as substituted by s. 32, sub-s. 1, of the Finance Act, 1926, came into operation, and the respondent was assessed for the year ending April 5, 1929, under the provisions of s. 31, sub-s. 1 (*a*), and s. 35 of the Finance Act, 1926. No question arises in regard to this last named assessment.

Under sub-r. 2 of r. 11 of the Rules applicable to Cases I. and II. of Sch. D, as substituted by s. 32, sub-s. 1, of the Finance Act, 1926, it was provided that, in the case of a succession occurring after April 5, 1928, the tax payable for all years of assessment by the person who had previously carried on the trade should be computed as if the trade had been discontinued at the date of succession. The respondent's liability to income tax for the year ending April 5, 1928, being the year preceding the year of assessment in which the succession occurred, was reviewed under the provisions of s. 31, sub-s. 1 (*b*), and the additional assessment under appeal was made. The amount of the assessment was arrived at by aggregating one-fourth part of the profits shown by the account for the year ending June 30, 1927, with three-fourths parts of the profits shown by the account for the year ending June 30, 1928, and deducting from the aggregate sum the amount of the original assessment for the year ending April 5, 1928. It was admitted by H.M. Inspector of Taxes that if the amount of the assessment had been calculated on correct principles it was mathematically erroneous, and ought to be reduced to the sum of 7774*l.*, as follows :—

One-fourth of 11,025*l.*	2,756*l.*
Three-fourths of 15,889*l.* . . .	11,916*l.*
	14,672*l.*
Less .	6,898*l.*
	7,774*l.*

It was contended on behalf of the respondent :—

(*a*) That as it had been customary for the respondent to make up accounts annually to June 30 in each year, and as only one account was made up to a date within the year preceding the year of assessment in which the succession occurred, and that account was for a period of one year ending June 30, 1927, the profits or gains of the year ending June 30, 1927, were required by s. 34, sub-s. 1 (*a*), of the Finance Act, 1926, to be taken to be the profits or gains of the year ending April 5, 1928, which was the year preceding the year of assessment in which the succession occurred.

(*b*) That as the profits or gains which were to be taken to be the profits or gains of the year ending April 5, 1928, were thus determined by s. 34, sub-s. 1 (*a*), of the Finance Act, 1926, it was not necessary, in order to arrive at the profits or gains of the year ending on that date, to have recourse to the method authorized by s. 35 of the Act, and the said s. 35 was inapplicable.

(*c*) That the additional assessment under appeal ought to be reduced to the sum of 4127*l*., being the difference between the original assessment of 6898*l*. made for the year ending April 5, 1928, and the profits or gains of 11,025*l*. shown by the account for the year ending June 30, 1927, which were required to be taken to be the profits or gains of the year ending April 5, 1928, for the purposes of s. 31, sub-s. 1 (*b*), no less than for the purposes of s. 29, sub-s. 1.

(*d*) Alternatively, that the trade was not permanently discontinued on July 2, 1928, and that s. 31, sub-s. 1 (*b*), of the Finance Act, 1926, was not applicable.

It was contended on behalf of the Crown (inter alia):—

(*a*) That in order to arrive at the profits or gains of the year ending on April 5 in the year preceding the year of assessment in which the succession occurred it was necessary to adopt the method authorized by s. 35 of the Finance Act, 1926.

(*b*) That the amount of the additional assessment under appeal had been computed on correct principles, and ought not to be reduced to less than 7774*l*.

The Commissioners who heard the appeal gave their decision in the following terms:—

"Every year of assessment begins on April 6, and the year preceding any year of assessment is the year ending April 5 immediately preceding the beginning of the year of assessment. The expression 'the year ending on April 5 in the year preceding the year of assessment' is therefore precisely equivalent to 'the year preceding the year of assessment.'

Applying the words of the Act to the concrete facts, and assuming that we are right in our decision that 'discontinued' at the end of s. 32, sub-s. 2, bears the same meaning as 'permanently discontinued' at the beginning of s. 31, sub-s. 1, we cannot avoid the conclusion that the amount to which the assessment for the year ending April 5, 1928, is adjustable under s. 31, sub-s. 1 (*b*), is the amount of profits or gains resulting from the account for the year ending June 30, 1927.

The company succeeded to the trade on July 2, 1928, and is assessable under s. 32, sub-s. 2, as if it had set up or commenced the trade at that time. The assessment on the predecessor for the year beginning April 6, 1928, originally based on the profits of the year ending June 30, 1927, has to be adjusted under s. 31, sub-s. 1 (*a*), to the amount of the profits of the period from April 6 to July 1, 1928, and as there is no account for that specific period recourse must be had to the method authorized by s. 35, and the profits of the year ending June 30, 1928, must be divided and apportioned to that period. The charge for the year ending April 5, 1928, has also to be adjusted under s. 31, sub-s. 1 (*b*), to the amount of the profits of that year, and here again, but for the provisions of s. 34, sub-s. 1 (*a*), it would be necessary, as the Inspector contends it is, to have recourse to s. 35. But it has been customary to make up accounts, and an account has been made up for a period of one year ending June 30, 1927, and this is the only account made up to a date within the year ending April 5, 1928. In these circumstances it is prescribed by s. 34, sub-s. 1 (*a*), that the profits or gains of the year ending June 30, 1927, shall be taken to be the profits or gains of the year ending April 5, 1928. A figure is thus provided which meets the requirements of s. 31, sub-s. 1 (*b*), and there is no necessity to adopt the method of s. 35 in order to arrive at the profits of the year ending April 5, 1928."

On appeal Rowlatt J. said that the respondent having discontinued trading on July 2, 1928, s. 31, sub-s. 1, of the Finance Act, 1926, became applicable. He was assessed under sub-s. 1 (*a*) for the year ending April 5, 1929, and as to this no question arose. Sub-s. 1 (*b*) however required a new computation of his taxable income for the year ending April 5, 1928, without reference by way of measurement to the profits of the year before; and the question was whether s. 34, sub-s. 1, applied to this computation. If it did not, there must be an apportionment under s. 35, which was what the Crown contended for. The Solicitor-General argued that s. 34, sub-s. 1, applied only when tax was charged in respect of a year by reference to the figures of the preceding year, but sub-clauses (*a*) and (*b*) of s. 31, sub-s. 1, were co-ordinate to the opening words of the sub-section, and those words showed that the sub-section as a whole was dealing with the year of assessment in which a discontinuance of trade occurred. Sub-clause (*b*) then imposed a retrospective charge on the profits of the preceding year. The year of discontinuance was throughout the section "the year of assessment," and the year before was "the year preceding the year of assessment." The addition of the words "in which the discontinuance occurs" did not make the phrase merely the appellation of a year as the subject of identification in point of chronology. If that had been intended it would have been simple to say "year ending on the fifth day of April preceding the discontinuance." The artificial language used was in his view intended to bring the year within the phrase "the year preceding the year of assessment." The appeal must be dismissed.

The Crown appealed.

Hon. Sir Stafford Cripps S.-G. and *R. P. Hills* for the appellant. The question is as to the mode of computing profits under s. 31, sub-s. 1 (*b*), of the Finance Act, 1926, in the year preceding the year of assessment in which the discontinuance of the business occurred. Sect. 29, sub-s. 1, had altered the mode of assessing profits of a trade or business by providing for assessment on the profits of the year preceding the year of assessment instead of on the average of the profits of the three preceding years. By s. 34, sub-s. 1, if a trader made up only one account for the purpose of his trade to a date within the year preceding the year of assessment and for a period of one year, the profits or gains shown in that account were to be taken "to be the profits or gains of the year preceding the year of assessment." The defendant's business having been sold in July, 1928, it was the profits for the year ending April 5, 1928, which had to be ascertained under s. 31, sub-s. 1 (*b*). In making the original assessment for that year it had been made on the trader's profits, as shown in the account ending June 30, 1926. The additional assessment was to be computed by deducting the amount of that assessment from the actual profits between April 6, 1927, and April 5, 1928. The defendant claims to resort to the profits of the trader's year ending June 30, 1927, under s. 34, sub-s. 1, in assessing the profits to April 5, 1928. But for the purpose of the additional assessments it is the profits made in the year of assessment that has to be computed, and not the profits of the year preceding the year of assessment, and therefore s. 34, sub-s. 1, has no application. The phrase "year preceding the year of assessment in which the discontinuance occurs" in s. 31, sub-s. 1 (*b*), is merely equivalent to the "penultimate year of the trade," and does not clothe the year with the character of "the year preceding the year of assessment," so as to make s. 34, sub-s. 1, apply. It is therefore erroneous to compute the additional assessment as the Special Commissioners had done. It is not however necessary to have a fresh account for the year to April 5, 1928, as this is just the kind of case where s. 35 applies. The profits must be taken as one-fourth of the profits shown in the trader's account ending June 30, 1927, and three-fourths of the profits shown in his account ending June 30, 1928. This was the method adopted by the Additional Commissioners, and it was correct.

A. M. Latter K.C. and *Bremner* for the respondent. Throughout s. 31, sub-s. 1, the artificial language used is intended to treat the year of discontinuance as the "year of assessment" in the income tax sense, and the previous year as the "year preceding the year of assessment," the profits of which are defined by s. 34, sub-s. 1, as the profits shown in the trader's annual account ending within that year. Throughout the Income Tax Acts "profits" never mean actual profits, unless there is an express provision to that effect. In the absence of such a provision there is no assumption that "profits" mean "actual profits." In s. 31, sub-s. 1, there is a strong inference that the contrary is intended. The omission of the word "actual" in s. 31, sub-s. 1, which replaces r. 8, sub-r. 2, of the Rules applicable to Cases I. and II. of Sch. D, where the word occurred is most significant. The actual profits for a year ending April 5 cannot be ascertained except in the extremely rare case where the trade year ends on the same day. The income tax practice has always been to take the figures of the trader's year. Sect. 34, sub-s. 1, of the Act of 1926 is of universal application. It cannot be regarded as a mere proviso to s. 29. It is only when this conventional method of computation fails that resort is had to apportionment under s. 35. Here the general rule must apply. The additional assessment is to be computed by reference to the profits of the year to April 5, 1928, and there being no such trader's account, the profits shown in the trader's account for the year ending June 30, 1927, are resorted to. It is true that s. 31, sub-s. 1 (*b*), refers to an assessment for the year to April 5, but that is always so; and ever since the Act of 1842 the profits have in fact been taken as the profits shown in the trader's annual account ending during the year. In the absence of the word "actual" in s. 31, sub-s. 1 (*b*), there is no justification for departing from the regular income tax practice. For the purpose of s. 31, sub-s. 1 (*b*), the year of assessment is the year of discontinuance, that is, 1928–9, and when under s. 31, sub-s. 1 (*b*), an additional assessment is being computed by reference to the profits to April 5, 1928, that assessment is being made on the profits for the year preceding the year of assessment. Sect. 34, sub-s. 1, is therefore directly in point, and regard must be had to the profits shown in the trader's account to June 30, 1927. The apportionment provision in s. 35 was properly applied in computing the assessment under s. 31, sub-s. 1 (*a*), but has no application in regard to sub-s. 1 (*b*).

[No reply was called for.]

LORD HANWORTH M.R. This is a troublesome point; and it is one on which I confess my own mind has fluctuated a good deal. It arises upon the construction of certain sections in the Finance Act, 1926, and in particular s. 31, and it is, perhaps, unfortunate that a word or two was not added in that section to prevent any difficulty arising.

Mr. Wesley carried on a business, and he sold the business to a company, which took the business over as from July 2, 1928. The position then arose, that from and after July 2, 1928, the business belonged to and was carried on by the company, but that for the time which elapsed between April 6 and July 1, 1928, Mr. Wesley was carrying on the business. What then is the liability imposed upon him? It is important to observe that the old liability, as it stood before the Act of 1926 was passed, was measured under r. 8 of the Rules applicable to Cases I. and II. of Sch. D. That rule provides by sub-r. 2 that where a trade is discontinued in any year, "any person charged or chargeable with tax in respect thereof, shall be entitled to be charged on the actual amount of the profits or gains arising therefrom in that year." It is to be observed that by the plain terms of that Rule, for the purposes of ascertaining the liability of the owner of the business, regard is to be had to the actual amount of the profits or gains arising therefrom in that year, that is, the year of discontinuance. That Rule is specifically repealed by Sch. V., Part I., to the Finance Act, 1926. Attention has been called to the fact that the words, "actual amount of the profits" are no longer to be found in the section that we have to consider. By the change of words it would seem that a change of purpose was indicated by the Legislature.

In the Act of 1926 there are several sections to which our attention has been drawn. First of all, s. 29, sub-s. 1, provides that instead of a system of three years' average, the profits or gains are to be computed "on the full amount of the profits or gains or income of the year preceding the year of assessment." That was the section which abolished the three years' system, and introduced in its place "the year preceding the year of assessment" as the basis of charge. Sect. 34 provides that where businesses make up their annual accounts to a certain date, the profits to that date in the year preceding the year of assessment shall be taken "to be the profits or gains of the year preceding the year of assessment." This section is designed to avoid the necessity of making up a special trading account ending on April 5, and it enables the trader to make use of the figures that he has arrived at for his own financial year. Sect. 35, as Mr. Bremner pointed out, introduced a new liberty in the Income Tax Acts by providing for the apportionment of profits. Before that section was passed there was no liberty or power to apportion the profits. Sect. 35 says: "Where in the case of any profits or gains chargeable under" certain Cases of Sch. D "it is necessary, in order to arrive at the profits or gains . . . . of any year of assessment or other period, to direct and apportion to specific periods the profits or gains," then "it shall be lawful to make a division and apportionment" of them. In addition to that, s. 31 replaces r. 8, sub-r. 2, of the Rules applicable to Cases I. and II. of Sch. D.

The present case upon the facts is one where there has been discontinuance of trade by Mr. Harold Wesley. It is not a case where there has been a succession in the sense of s. 32, as where there is a substitution of a partner in a partnership, or the like, but the business continues to be carried on in the same way, though not precisely by the same persons. Here we have a case in which there has been a discontinuance; and it appears to me that, in the Case stated by the Commissioners, they inaccurately use the words "The company succeeded to the trade after April 5, 1928." It really was a case in which there had been a complete discontinuance by this taxpayer Mr. Wesley, and the company took on the business. In that sense the company succeeded, but from the point of view of Mr. Wesley he had completely and permanently discontinued his business.

The year of assessment that we have to consider is the year ending April 5, 1928. The only question is: What is the measure of the liability of Mr. Wesley for that period? No question arises with regard to his liability for the year ending April 5, 1929. That, as stated in the Case, has been easily adjusted. It has been adjusted in this way. Under s. 31, sub-s. 1 (*a*), there is a provision whereby he is to be chargeable on the amounts of the profits or gains beginning on April 6 in the year of discontinuance and ending at the date of discontinuance. That has been done, and no question arises, therefore, in respect of the year ending April 5, 1929.

By s. 31, sub-s. 1 (*b*), there is a further liability imposed upon the trader who has discontinued his business. It provides that an additional assessment may be made upon him in appropriate circumstances; and it is in reference to this additional assessment that the question arises. As I have pointed out, in r. 8, sub-r. 2, of the Rules to which I have referred, there was a distinct reference to "actual profits"; but that word "actual" does not appear in s. 31, sub-s. 1 (*b*). It seems not right therefore to introduce an argument based on the suggestion that no change in income tax practice was intended. The argument would seem to bear the other way. The effect of s. 31, sub-s. 1 (*b*), is that an additional assessment is to be made over and above the amount on which taxation was imposed in the year preceding the year of assessment in which discontinuance occurs, if the new amount to be ascertained by the method laid down in this clause exceeds the amount of the original assessment. The root difference between the Crown and this taxpayer is what is meant by "the profits or gains of the year ending on the 5th day of April in the year preceding the year of assessment in which the discontinuance occurs." Here the discontinuance occurred in July, 1928. The year preceding the year of assessment in which the discontinuance occurs would appear to be the year ending April 5, 1928, and the sum to be ascertained under sub-s. 1 (*b*) is the sum which should be imposed as additional liability in that year. The latter part of sub-s. 1 (*b*) seems to make this plain: "an additional assessment may be made upon him, so that he shall be charged for that preceding year"—that is the year preceding the year in which the discontinuance occurs—"on the amount of the profits or gains of the said year ending on the 5th day of April." For the purpose of the additional assessment, regard must first be had to the fact that the respondent has already had an assessment made upon him by resort to the provisions of s. 34, sub-s. 1, and he has been allowed to take his own financial year as indicating the figure which is basic to the charge upon him. There has then to be ascertained the profits down to April 5, but it is not possible, I think, to say that what is contemplated by sub-s. 1 (*b*) would be discovered by applying s. 34. If that had been so, it would have been easy to put words into sub-s. 1 (*b*) to make it plain. The words of sub-s. 1 (*b*) are plain, and do not admit of resort to what might be called income tax practice, under which the trader is assessed by reference to the profits shown in his accounts to any particular date.

For these reasons it appears to me that it is not possible to accept the view presented by the Special Commissioners, who have reduced the figure of liability from 7774*l.* to 4127*l.*, a change accepted by Rowlatt J. In my judgment, for the reasons which I have stated, the Additional Commissioners were right in their original computation of 7774*l.*, and the assessment of that figure should be restored.

The appeal will be allowed, and the case must be remitted to the Commissioners, unless it is plain and accepted by the parties that the trading figure ought to stand of 7774*l.*

LAWRENCE L.J. I agree. The question in this case is whether the additional assessment to income tax in the sum of 8102*l.* (which admittedly ought to be reduced to 7774*l.*), made by the Additional Commissioners upon the respondent for the year ending April 5, 1928, was computed upon correct principles. The respondent had carried on the business of a manufacturing stationer for some years prior to July 2, 1928, on which date he sold his business to a private limited company. The Finance Act, 1926, effected an alteration in the then prevailing method of computing profits under Sch. D in cases like the present. By s. 29 of the Act it was provided that instead of the profits being computed upon the average of three years, as theretofore, they should in future be computed on the amount of profits "of the year preceding the year of assessment." By s. 34, sub-s. 1, it was enacted (inter alia) that where in the case of any trade it had

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been customary to make up accounts yearly to a date within the year of assessment, the profits of the year ending on that date should be taken "to be the profits or gains of the year preceding the year of assessment." In the case of the respondent's trade it had been customary to make up yearly accounts to June 30 in each year. The profits of the year ending on June 30 had, whilst the trade was being carried on, been taken to be the profits of the year preceding the year of assessment.

The Act of 1926, in addition to making the alteration in the method of computing the profits to which I have referred, contains special provisions applicable to cases where a trade had been permanently discontinued in the year of assessment. Those provisions are to be found in s. 31, which, so far as material, provides by sub-s. 1 that where in any year of assessment the trade is permanently discontinued, then notwithstanding anything in Part IV. of the Act (sub-cl. (*a*)) the person charged with income tax in respect thereof shall be charged for that year on the amount of the profits or gains for the period beginning on April 6 in that year, and ending on the date of the discontinuance, and if he is charged otherwise than in accordance with that provision, any tax overpaid is to be repaid, or any additional assessment is to be made upon him, as the case may require, and (sub-cl. (*b*)): "If the profits or gains of the year ending on the 5th day of April in the year preceding the year of assessment in which the discontinuance occurs exceed the amount on which the person has been charged for that preceding year," an additional assessment may be made upon him, "so that he shall be charged for that preceding year on the amount of profits or gains of the said year ending on the 5th day of April." In the present case the respondent's trade was permanently discontinued on July 2, 1928, when it was sold to the company; that is to say, in the year of assessment commencing on April 6, 1928, and ending April 5, 1929. As regards the period from April 6, 1928, to July 2, 1928, the provisions of sub-s. 1 (*a*) became applicable, and the respondent was duly assessed on the profits of that period. No question arises as to this assessment. As regards the year ending April 5, 1928, the provisions of s. 31, sub-s. 1 (*b*), became applicable, and an additional assessment was made upon the respondent, computed upon the excess of the profits of that year over the amount on which the respondent had been charged for that year.

The respondent appealed against the assessment to the Special Commissioners on the ground that it was incorrectly computed, contending that the profits of the year ending April 5, 1928, ought to be computed under s. 34, sub-s. 1, on the profits shown by his customary yearly account to have been made in his trade up to June 30, 1927, and not on the actual profits of the year ending on April 5, 1928. The Special Commissioners upheld the respondent's contention and allowed his appeal. Rowlatt J. has affirmed the decision of the Special Commissioners, hence the present appeal. In my judgment the conclusions arrived at by the Special Commissioners and Rowlatt J. were erroneous.

Sect. 34, sub-s. 1, in my opinion, only deals with the method of computing profits for the year preceding the year of assessment for the purpose of arriving at the amount of income tax to be charged in the year of assessment under s. 29, and has no application to an additional assessment under s. 31, sub-s. 1 (*b*). In the present case under the combined operation of ss. 29 and 34, sub-s. 1, the respondent was rightly assessed for the year ending on April 5, 1928 (being the year preceding the year of assessment in which the discontinuance occurred), on the profits of the preceding year 1926–27 computed on the customary annual account made up to June 30, 1926. The sum arrived at by this method of computation was 6898*l.* For the purpose of arriving at the amount of the additional assessment to be made under s. 31, sub-s. 1 (*b*), the Additional Commissioners proceeded to ascertain the amount of profits of the year ending April 5, 1928. This they did by applying s. 35 and making an apportionment under that section. Sect. 35 provides : " Where in the case of any profits . . . . it is necessary, in order to arrive at the profits or gains . . . . of any year of assessment . . . . to divide and apportion to specific periods the profits or gains . . . . for any period for which the accounts have been made up, or to aggregate any such profits or gains . . . . or any apportioned parts thereof, it shall be lawful to make such a division and apportionment or aggregation." Applying this method the Additional Commissioners took one-fourth of the profits (which profits amounted to 11,026*l.*) shown by the annual account made up to June 30, 1927, to have been earned up to that date, and three-fourths of the profits (which profits amounted to 15,889*l.*) shown by the account made up to June 30, 1928, to have been earned up to that date, and aggregated these apportioned parts of the profits, and thus arrived at the sum of 14,672*l.* as the total amount of the profits of the year preceding the year of assessment in which the discontinuance had taken place. The profits so ascertained exceeded the amount on which the respondent had been already assessed for that year by the sum of 7774*l.*, and an additional assessment for that amount was made upon him, so that (in the words of the Act) he should be charged for that year on the amount of profits or gains of that year ending on April 5, 1928. In my opinion this assessment was made on correct principles, and came strictly within the letter and spirit of s. 31, sub-s. 1 (*b*).

Turning once more to that enactment and reading it in the light of the facts of the present case it will be seen that sub-s. 1 provides that where in any year of assessment a trade is permanently discontinued—which in fact happened in this case in the year of assessment 1928–29—then, notwithstanding the previous provisions in s. 29, two consequences are to ensue: the first deals with the broken period of April 5, 1928, to July 2, 1928, as to which there is no question, and the second deals with the year preceding that year (that is to say the year 1927–28), and as regards that sub-s. 1 (*b*) provides that: "If the profits or gains of the year ending on the fifth day of April in the year preceding the year of assessment in which the discontinuance occurs" —which preceding year ended on April 5, 1928, and the profits consequently are the profits of the year 1927–28—"exceed the amount on which the person has been charged for that preceding year,"—that is to say, exceed the amount on which the respondent had been charged to tax for the year ending 1928, which excess amounted to the sum of 7774*l.*—an additional assessment may be made upon him "so that he shall be charged for that preceding year"—that is to say, for the year ending April 5, 1928—"on the amount of the profits or gains of the said year ending on the fifth day of April." He is therefore to be charged for the year ending April 5, 1928, by way of additional assessment on the sum of 7774*l.*, being the excess of the profits of that year over the amount for which he had been already assessed for that year.

In ascertaining the excess in respect of which the additional assessment is to be made under this sub-section, there seems to me to be no room for the application of s. 34. The latter section deals solely with the method of calculation to be adopted in ascertaining the profits of the year preceding the year of assessment, whereas what has to be ascertained, in order to arrive at the excess under s. 31, sub-s. 1 (*b*), is the amount of the profits of the year of assessment.

The method of computation prescribed by s. 34 has already been applied in the present case in ascertaining the respondent's original assessment for the year ending April 5, 1928. Under s. 31, sub-s. 1 (*b*), it became necessary to ascertain to what extent the actual profits of that year exceeded the amount of the original assessment made for that year, and s. 34 does not prescribe any method of computing those profits, which must be computed by applying s. 35.

In the result for the reasons stated I have come to the conclusion that this appeal ought to be allowed.

ROMER L.J. I agree. The question arising on the appeal is a very short one, and turns principally on s. 31, sub-s. 1, of the Finance Act, 1926. That sub-section, as its introductory words say, applies: "where in any year of assessment," which means, of course, in any year beginning on

April 6 of one year and ending on April 5 of the next year, " a trade, profession or vocation is permanently discontinued." When that event happens the sub-section comes into operation, and then proceeds to deal with two things. Clause (*a*) of the sub-section deals with an assessment to be made in respect of the year in which the discontinuance occurs. Clause (*b*) deals with a further assessment to be made in respect of the year preceding the year in which the discontinuance occurs. In the present case the discontinuance of the trade took place on July 2, 1928. Thereupon an assessment for the year April, 1928, to April, 1929, had to be made, and it was made in accordance with cl. (*a*). No question turns in this appeal upon that assessment. Under sub-s. 1 (*b*) a further assessment had to be made in respect of the year 1927–28, and it is the amount of that additional assessment that is in question on this appeal. Looking at the sub-section and applying it to the material dates, it appears that what has to be done under cl. (*b*) is to compare the profits or gains of the year ending on April 5, 1928, with the amount which the respondent was charged for that year. That amount we know is, as provided by s. 29, sub-s. 1, of the Act, the amount of the profits for the year preceding 1927–28—namely, the year 1926–27. That comparison having been made, if the profits or gains for the year ending on April 5, 1928, exceed the amount of the profits for the year preceding that, then an additional assessment is to be made equivalent to the amount of that excess. So that, looking at the plain words of the section, the profits for the year ending April 5, 1928, have to be ascertained.

One would think that there was no difficulty about that, but the respondent says that by s. 34, sub-s. 1, the profits are not to be ascertained up to April 5, 1928, but up to June 30, 1927, that is the date in that year to which the accounts of his business are made up. Sect. 34, sub-s. 1, provides: " Where in the case of any trade, profession or vocation, ... it has been customary to make up accounts,— (*a*) if only one account was made up to a date within the

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year preceding the year of assessment, and that account was for a period of one year, the profits or gains of the year ending on that date shall be taken to be the profits or gains of the year preceding the year of assessment." But what we are doing here is not to ascertain the profits of the year preceding the year of assessment, but to ascertain the profits of the year of assessment and then compare them with the profits of the year preceding the year of assessment. Sect. 34, sub-s. 1, obviously has no application when we are attempting to ascertain the profits of the business for the year ending April 5, 1928, for the purposes of comparing it with the profits for which in respect of that year it was assessed to income tax. It is said that the section does apply, because the year 1927–28 is the year preceding the year of assessment. I cannot accede to this argument, which is based upon what I cannot help thinking is a misreading of the language of sub-s. 1 (*b*) of s. 31. That clause commences: "If the profits or gains of the year ending on the fifth day of April in the year preceding the year of assessment in which the discontinuance occurs." Those words, "the fifth day of April in the year preceding the year of assessment in which the discontinuance occurs," are words of description, and nothing else. Every year of assessment precedes another year of assessment, and the fact that the year of assessment may be described as preceding the following year of assessment does not make it for the purposes of assessment the year preceding the year of assessment. Under cl. (*b*) of sub-s. 1 of s. 31 the year 1927–28 is the year of assessment, and it does not cease to be the year of assessment because it is described as being the year preceding the year of assessment 1928–29. Sub-s. 1 of s. 34 therefore has no application to the case. Profits from April 6, 1927, to April 5, 1928, have to be ascertained. Here, fortunately, both in the interests of the respondent, the taxpayer, and of the Crown, instead of a new account having to be drawn up, s. 35 comes into operation, and the profits can be ascertained for the purposes of this additional assessment by taking the proper proportion of the profits shown by the respondent's balance sheet ending on June 30, 1927, and the proper proportion of the profits shown by his balance sheet ending on June 30, 1928. For these reasons it appears to me that this appeal must be allowed.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; de la Chapelle & Co.*

H. C. G.

WIDNES FOUNDRY (1925), LIMITED *v.* CELLULOSE ACETATE SILK COMPANY, LIMITED.

K. B. D.
1931
March 5, 6, 9, 10, 11, 20.
C. A.
May 18, 19.

[1930. W. 1087.]

Contract—Construction—Measure of Damage—Penalty or liquidated Damages—Inadequacy—Reasonable Pre-estimate.

A contract for delivery and erection of an acetone recovery plant provided that if the contract were not completed within a certain time, the plaintiffs should pay to the defendants by way of penalty a sum of 20*l.* for every week that they were in default.

There was a period of 30 weeks' delay beyond the contract period, and the defendants claimed 5850*l.*, the actual loss suffered by them. The plaintiffs, in reliance on the above term, only admitted liability for 600*l.*:—

Held, that the sum of 20*l.* a week must be regarded not as a penalty but as liquidated damages, and therefore that the plaintiffs were liable for 600*l.* only.

Semble, in a clause of this kind the amount fixed as payable by the party in default cannot be a "penalty" if it is less than the actual loss suffered by the other party.

Decision of Wright J. varied.

ACTION tried by Wright J. without a jury.

The plaintiffs in this action, which was commenced by specially indorsed writ, claimed 19,750*l.*, the agreed cost of an acetone recovery plant delivered to the defendants and erected for them by the plaintiffs, less 8330*l.* paid on account, under written contract between them contained in a specification and acceptance dated March 8, 1929. In their defence the defendants alleged that it was a term in the contract that part of the sum of 19,750*l.* should not be payable until certain tests had been completed by the plaintiffs, and that these were not completed at the date of the issue of the writ. They also counterclaimed for damages by reason of the alleged failure of the plaintiffs to deliver or erect the plant within the time stipulated by the contract.

The plaintiffs in their reply and defence to the counterclaim (apart from denials) set up a clause in the contract which provided that in the event of their being in default in delivery they should pay to the defendants the sum of 20*l.* for every week in which they were in default, and alleged that such sum of 20*l.* a week was fixed by the contract as liquidated damages for such breach and was the only damage recoverable.

The facts of the case and the findings thereon were stated by Wright J. in his judgment on the case as follows:—

The plaintiffs are manufacturers of machinery and plant for the recovery of acetone used in the making of artificial silk by the cellulose process. A viscous fluid called "dope" is made by the mixing of acetate and acetone, and is forced through a machine called the spinning machine, from which it comes out in jets through very minute openings in the form of thread, which goes on bobbins in a closed cabinet; the volatile acetone comes off in the form of gas. In normal use three tons of acetone, worth about 76*l.* a ton, are used for every ton of the artificial silk spun. This valuable product is lost, unless saved by recovery plant consisting of a complicated series of metal chambers, but when so recovered can be used again and again, thus involving a very large reduction in the cost of the artificial silk. In the early part of 1929 the defendants, who had large works at Lancaster, were desirous of manufacturing artificial silk on a large scale, and ordered the "spinning" machinery for delivery early in July, 1929. They were anxious to start operations as early as possible, but obviously wished to have the recovery plant ready as soon as the spinning plant, and in asking the plaintiffs for tenders explained the position, and stated that they must have delivery in eighteen weeks. The plaintiffs at first refused to promise delivery save in eight or nine months, but the urgency of the case was emphasized by the defendants, who pointed out that they must start work in spinning when that plant was ready, and in that event if the recovery plant was not installed and able to work, very heavy losses would be incurred by the waste of the acetone, which would go off into the air and be lost, instead of being saved by the recovery plant. With these facts in mind a contract was entered into between the parties contained in two written documents. One was a quotation from the plaintiffs dated March 5, 1929, at a price of 19,750*l.*, the plant to be delivered and erected in 18 working weeks from receipt of final approval of the drawings. Clause 10 was in these terms: "If this period of 18 working weeks is exceeded we (that is the plaintiffs) agree to pay by way of penalty the sum of 20*l.* per working week for every week we exceed the 18 weeks, subject to the usual strike, lock-out and general conditions beyond our control." There was also a guarantee of recovery of a minimum of 85 per cent., and a maximum of 90 per cent. of the acetone from the gases brought from the defendants' plant into the recovery plant, with a proviso that the plaintiffs were to forfeit 250*l.* for every 1 per cent. loss of recovery between 90 per cent. and 85 per cent. of the acetone. This quotation was accepted by the defendants by a document of March 8, 1929. The price originally quoted was 19,250*l.*, but when the plaintiffs agreed to do the work in 18 weeks the quoted price was increased by 500*l.* Drawings were finally approved by March 14, 1929, so that the agreed period of weeks then began to run, and expired on July 27, 1929. The complete installation was not delivered and erected so as to satisfy the contract tests until February 10, 1930, which is a delay beyond the contract period of 30 weeks. In fact, however, the essential part of the recovery plant was erected and able to function in recovering the acetone by January 3, 1930, the portion then incompleted being a section for purifying the acetone recovered, and this section in practice was found unnecessary. The spinning machinery was ready for use early in July, 1929, and the defendants began to work it, at first in an experimental form, but as from September 3, 1929, they used it for spinning silk, though not to its full extent. They are claiming by way of damages as from that date the value of the acetone that would have been recovered if the plaintiffs had delivered their recovery plant in time. The plaintiffs do not deny that the defendants acted reasonably in working their spinning plant as they did, and do not deny that the defendants have lost in that way a large quantity of acetone which if the recovery plant had been available would have been saved. They are prepared to admit liability for 30 weeks' delay at 20*l.* a week, that is 600*l.*, but say that they are not liable further, because the weekly sum of 20*l.* is a sum of liquidated damages, so that the defendants have no further or other claim. I shall refer later to some alternative answers that the plaintiffs make to the claim. The plaintiffs have offered no explanation why they took so much longer than they agreed to execute their contract, or why they undertook to do the work in a time which they so signally failed to achieve. They only refer to an estimated delay of 5 weeks, due to an accident with a crane and a suspension of work at the defendants' factory before and after Christmas. But these matters may be disregarded, since the defendants do not claim damages until from September 5, 1929, which is more than 5 weeks beyond the agreed date of July 27, 1929, and to the extent that work was suspended in December, 1929, at the defendants' factory, the loss of acetone was proportionately reduced. The defendants proved that the value of the acetone used in the spinning plant was 16,802*l.* during the period from September 5, 1929, to January 3, 1930, allowing credit for what was left in the spinning plant at the end of that period, but they admit that of the acetone so used a substantial portion would normally be lost in the spinning chamber from various causes, and would not have reached the recovery plant, and they further are willing to calculate their loss on the basis of the guaranteed minimum recovery of 85 per cent. of what reached the recovery plant, though in fact it recovered in actual user 98 per cent. of what reached it. A great deal of evidence and discussion was directed to ascertaining the former figure. From February to June, 1930, the average loss in the cabinets or chambers was about 22 per cent., that is about 78 per cent. reached the recovery plant. The plaintiffs contended that a much greater loss must be allowed for in the period from September to December, 1929, because the men were less experienced and the spinning machines less efficient, so as to involve frequent opening of the chambers to correct errors and defects, in which case the volatile acid would escape into the air, and would not have been carried by the fans into the recovery plant if it had been there, and some, but less serious, losses were sustained in flushing the machines (called bleeding) and in the defective working of the jets (called blebbing). I have carefully examined the evidence, and find that a fair allowance in all the circumstances for loss in the relevant period is 40 per cent. It is therefore necessary to take 85 per cent. of 40 per cent. of 16,800*l.* as representing the value of the acetone lost, which gives a figure of 8500*l.* From this must be deducted the agreed cost of working the recovery plant—namely, 2650*l.*—which gives a figure of loss of 5850*l.*, which in my judgment is the actual loss suffered by the defendants.

Rayner Goddard K.C. and *O'Hagan* for the plaintiffs.

Sullivan K.C. and *G. J. Paull* (*J. H. Goldie* with them) for the defendants.

The arguments sufficiently appear from the judgment of Wright J.

1931. March 20. Wright J. [after reading the above statement of facts and points at issue, and assessing the defendants' actual loss as 5850*l.*, continued his judgment as follows:] Mr. Goddard has strenuously contended that the defendants cannot recover this loss, but are limited to the sum of 600*l.*, being 30 weeks at 20*l.* a week, as being the sum conclusively agreed in advance under the contract as the total damages recoverable for the breach, whatever the actual damage, which, according to my finding, was in fact about ten times as much. He contended that a stipulated sum can only be construed as a penalty on the ground of being incommensurate with the actual or contemplated damage if it is unconscionable or exorbitant, but not if it is grossly inadequate. I cannot find that this contention has been expressly put forward or dealt with on the cases, but in my judgment it is ill-founded. The relevant criterion is whether the stipulated sum can or cannot be deemed to be, in the words of Lord Dunedin, "a genuine covenanted pre-estimate of damage," and the Court may hold in a proper case that it fails to satisfy this test, and hence is a penalty, by reason of its extravagant inadequacy as well as by reason of its exorbitance. As a matter of history the Courts of equity and (under the Act of 8 & 9 Will. 3, c. 11) the Courts of law occupied themselves with relieving against penalties where the penal sums were in excess of the damage; "the penalty is auxiliary to enforcing performance of the contract," said Lord Ellenborough in *Harrison* v. *Wright*. (1) The aggrieved party could sue for the penalty, in which case, however much his proved loss fell short of the penal sum, he could not recover more. On the other hand, he could disregard the penalty altogether and sue on the covenants, and recover his actual loss even beyond the penal sum. Hence Courts in dealing with penalty clauses were more concerned with extravagance than defect, because if the penalty was inadequate to the damage, the party aggrieved could sue on the covenant. But as soon as parties began to substitute for penalty clauses stipulations intended to define conclusively the damage recoverable, it seems clear that in principle the test of disparity might be applied either way. Once it was established that the use of the word "penalty" or of the words "liquidated and agreed damage," though not entirely to be disregarded, was not conclusive, Courts in deciding whether the sum was penalty or not had to deal with the question as a matter of construction of the contract, to be ascertained by considering not only the language of the contract, but all the facts of the case and the circumstances known or contemplated by both parties. Many cases can be cited embodying rules to help judges to decide the question, but the rules are never referred to as other than prima facie. No doubt the test of exorbitance or excess is most frequently invoked, as in the familiar case of a stipulation for the payment of a larger sum of money in default of due payment of a smaller sum, and this test was emphasized by Lord Dunedin in the case of *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.* (1), where he said: "It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach." But Lord Dunedin stated the principle more generally in *Public Works Commissioner* v. *Hills* (2), in this way: "The general principle to be deduced from that judgment seems to be this, that the criterion of whether a sum—be it called penalty or damages—is truly liquidated damages, and as such not to be interfered with by the Court, or is truly a penalty which covers the damage if proved, but does not assess it, is to be found in whether the sum stipulated for can or can not be regarded as a 'genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation.' The indicia of this question will vary according to circumstances. Enormous disparity of the sum to any conceivable loss will point one way, while the fact of the payment being in terms proportionate to the loss will point the other. But the circumstances must be taken as a whole, and must be viewed as at the time the bargain was made." This language is, I think, as applicable to defect as to exorbitance, and in *Watts, Watts & Co., Ld.* v. *Mitsui & Co., Ld.* (3) Lord Sumner seems definitely to apply the test of inadequacy. He is dealing with a charterparty clause (No. 13): "Penalty for non-performance of this agreement proved damages not exceeding the estimated amount of freight." In such a case it seems clear that while the freight might be, say, 5000*l.*, damage or loss to cargo due to breach of the agreement might be 50,000*l.* or more. Lord Sumner says: "I have no doubt that clause 13 is a penalty clause and immaterial in the present case. To read it otherwise is to ignore the first word 'penalty.' True the use of that word is not decisive; but it is not impossible to read the residue of the clause as defining a mode of calculating a mere penal sum; and to read it as a limitation of the right to recover proved damages seems to me to produce an absurd result in business. Whatever the value of the cargo or the extent of the injury to it, the shipowner's liability in respect of it would be limited to the estimated amount of the freight, however that estimate is to be made. If the cargo owner is uninsured, he stands to lose large sums for the ship's default. If he is insured, he upsets the ordinary course of insurance business by depriving his underwriter of a valuable right of recourse, and must suffer for this in one way or another. Nothing could be less like a 'genuine covenanted pre-estimate of damage,'" referring to Lord Dunedin's phrase. This I take to be a decisive recognition that the test of disproportion is not limited to cases of exorbitance, and I think it is applicable to the present case. There is also a further matter to be considered in determining if the stipulated sum can or cannot be held to be a genuine pre-estimate of damage, and that depends on whether the damage is reasonably capable of pre-estimate. Thus in *Webster* v. *Bosanquet* (1), where a sum was stipulated as payable for breach by a sale to other than the plaintiff of the whole or part of the crop of a tea plantation, Lord Mersey in arriving at the opinion that the sum was liquidated damages gave weight to the uncertainty of the damage. He said: "When making the contract it was impossible to foresee the extent of the injury which might be sustained by the plaintiff if sales of the tea were made to third parties without his consent. That such sales might seriously affect his business was obvious, and the very uncertainty of the loss likely to arise made it most reasonable for the parties to agree beforehand as to what the damages should be. And, furthermore, it is well known that damages of this kind, though very real, may be difficult of proof, and that the proof may entail considerable expense. This consideration also afforded a reason for fixing the amount before hand." In the *Dunlop* case (1) Lord Dunedin gave as a further ground for deciding that the sum specified in respect of breaches in undercutting prices was liquidated damages the circumstance that the damage would be indirect, and that no rule or measure of damages would have been available for the guidance of a jury as to the amount of the damages, but the judge would have had to tell them that they must fix the amount as best they could. In the present case, however, in addition to the disproportion between the sum stipulated and the actual or anticipated damage, I do not think, as I understand the facts, that it could be said that the damage to be reasonably anticipated in the event of delay was indirect or uncertain in its nature; on the contrary for each period of delay the direct and necessary damage was the loss of the acetone at the cost of 76*l*. a ton. No doubt it was unlikely that at the outset the defendants' factory would work at its full capacity or with full efficiency, nor in fact did it; but even so the actual loss, as I have found it, was ten times the penal sum, and was, I think, well within the reasonable contemplation of the parties who could have formed a reasonable pre-estimate of probable loss; certainly there would have been no difficulty in guiding a jury as to the rule or measure of damage. In my judgment both the considerations which I have discussed point to what I think is the true conclusion —namely, that the sum of 20*l*. a week is penalty and not a pre-estimate of damage. Nor do I think this conclusion is negatived by a further argument pressed by Mr. Goddard—namely, that the sum should be held to be liquidated damages because it is applied to the breach of one stipulation—namely, delay—with added increments for each further increment of delay. No doubt this fact is very relevant to consider. Such a consideration is often present in building contracts, and was emphasized in *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (2) and in *Clydebank*

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(1) (1811) 13 East, 343.

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(1) [1915] A. C. 79, 87.

(2) [1906] A. C. 368, 375.

(3) [1917] A. C. 227, 246.

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(1) [1912] A. C. 394, 398.

(1) [1915] A. C. 79.

(2) (1886) 11 App. Cas. 332.

Engineering and Shipbuilding Co. v. *Don Jose Ramos Yzquierdo Y Castaneda* (1); but, as was pointed out in the latter case, it is always necessary, also, to have regard to the two considerations of disproportion in amount and uncertainty of damage. This is very fully referred to by Lord Halsbury in a passage which I need not read in full: "The very reason why the parties do in fact agree to such a stipulation is that sometimes, although undoubtedly there is damage and undoubtedly damages ought to be recovered, the nature of the damage is such that proof of it is extremely complex, difficult, and expensive." He has already said that regard must be had to the nature of the transaction, the thing to be done, the loss likely to accrue to the person who is endeavouring to enforce the performance of the contract, and so forth. In the present case in my judgment all these considerations lead to the inference that the stipulated sum was intended as a penalty. This inference is strengthened by the use of the word "penalty" and not the words "liquidated damages." This use of the word "penalty" is far from conclusive, but cannot be disregarded, since in construing a contract some attention must be paid to the language which the parties have chosen, and I think that strengthens the opinion which I have formed for the other reasons I have explained—namely, that the stipulated sum of 20*l.* is a penalty, and that the defendants are entitled to recover their actual damage, which I have assessed at 5850*l.*

[His Lordship then dealt with other points raised which are not here material and concluded :] The plaintiffs must have judgment for 19,750*l.* on the claim and the defendants for 5850*l.* on the counterclaim.

F. P. F.

The plaintiffs appealed. The appeal was heard on May 18 and 19, 1931.

Rayner Goddard K.C. and *O'Hagan* for the appellants. Wright J. was wrong in holding that the clause in question was a penalty clause which therefore must be ignored. In arriving at that conclusion he failed to give sufficient weight to the difficulties of the parties in arriving at any kind of precise estimate of the amount of damage that would be suffered in any particular number of weeks. To forecast this with any degree of accuracy being quite impossible, the parties fixed a figure—it was in fact suggested by the respondents—which would not scare the appellants from entering into the contract and which was the best pre-estimate they could make of the probable loss that might be occasioned if there should be delay in completing the installation of the apparatus. The sum thus fixed was consequently not a penalty but was liquidated damages. In the charterparty cases that which is called the penalty clause has always been relieved against, because the amount stated to be payable was to be paid on a breach of any one of a great number of stipulations of varying importance. That is not the case here; the amount in this case is payable in one event only—namely, delay in completing the contract within the stipulated period.

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(1) [1905] A. C. 6, 11.

[They were stopped.]

Sullivan K.C., *G. J. Paull* and *J. H. Goldie* for the respondents. The question is, did the parties agree on the sum of 20*l.* per week as a genuine pre-estimate of the damage likely to be occasioned in case of delay on the part of the appellants in completing the contract? The clause calls the 20*l.* a "penalty," and although that may not be conclusive some regard must be paid to it. To substitute the expression "liquidated damages" for "penalty" in the clause, and to treat the sum as a genuine pre-estimate of the damage likely to be caused by delay, renders the whole contract an absurdity. The purpose of the clause was merely to emphasize the fact that time was to be of the essence of the contract, and in our submission it is a mere brutum fulmen.

[SLESSER L.J. To insert a smaller sum than that which is likely to be the actual damage suffered if there is delay does not act in terrorem.]

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Widnes Foundry (1925), Ld. v. Cellulose Acetate Silk Co.

If the clause is to be construed as a liquidated damages clause it puts a premium on delay. The sum fixed by a penalty clause is not merely a sum in terrorem, it is a sum which is not a genuine pre-estimate of the damage likely to arise on failure by the contracting party to fulfil his obligation, and the sum fixed cannot be a genuine pre-estimate of the damage when, as in this case, it is ridiculously low.

[*Elphinstone* v. *Monkland Iron and Coal Co.* (1); *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.* (2); *Wall* v. *Rederiaktiebolaget Luggude* (3); and *Watts, Watts & Co., Ld.* v. *Mitsui & Co., Ld.* (4), were referred to.]

Scrutton L.J. This is an interesting case, but I have no doubt with regard to the result that should be arrived at.

The defendant company—the respondents—have a large factory for making artificial silk. One of the ways of making this is by the use of a chemical called acetone. In the first process it appears that much of the acetone is evaporated; it is expensive stuff, and consequently machinery is wanted which will recover the acetone which is lost in the first process. The present case is concerned with a contract for the supply of machinery to perform this operation. The plaintiffs tendered for machinery for this purpose, and offered to supply it within nine months. The defendants wanted quicker delivery, saying that they must have the machinery within eighteen weeks. It was of course open to the plaintiffs to refuse delivery within this period; they in fact said: "If you want delivery in eighteen weeks you must pay a larger price, because it will be necessary for us to work a night shift," and the plaintiffs asked an additional amount of 500*l.* This proposition was discussed at an interview between the parties, and the defendants said they must have some guarantee that the work would be carried out within the time stipulated; they would want a guarantee of a penalty of 20*l.* a week. The matter was not then settled; negotiations continued, and in a letter of February 20, the plaintiffs said they were prepared to undertake the work under a penalty of 20*l.* a week and a bonus of 10*l.* a week if the work was completed by an earlier date. Apparently the latter proposition, that is, as to the bonus, was not agreed to. In the contract ultimately made this clause appears: "If this period of 18 working weeks is exceeded we [the plaintiffs] agree to pay by way of penalty the sum of 20*l.* per working week for every week we exceed the 18 weeks, subject to the usual strike, lock-out and general conditions beyond our control." The work was carried out, but the plaintiffs were in breach, inasmuch as the machinery was not delivered within eighteen working weeks. The plaintiffs are ready to pay the sum of 20*l.* a week mentioned in the clause in respect of the excess period, but the defendants decline to accept this, as, they say, they have suffered more than 20*l.* a week damage by the delay, and they claim to be entitled to recover the full amount of the damage they have sustained.

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(1) (1886) 11 App. Cas. 332.

(2) [1915] A. C. 79.

(3) [1915] 3 K. B. 66.

(4) [1917] A. C. 227.

Upon these facts the first question is: is the clause a penalty clause so that it cannot be enforced, or is it like the ordinary clause to be found in most building contracts, a clause fixing the time for completion and fixing the amount to be paid for default, varying with the duration of the delay? It is fortunately not necessary to go into all the cases which have discussed particular forms of words and the origin of this penalty jurisprudence. Suggestions have been made as to its origin, some saying that it was equitable, and Sir George Jessel M.R. saying that was wrong. Historically there is a good deal of disagreement as to how it grew up, but personally I consider myself bound by the summary of the cases given by Lord Dunedin in *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.* (1) First, though the parties to a contract use the words "penalty" or "liquidated damages" and may prima facie be supposed to mean what they say, the words used are not conclusive. The substance and not the mere words must be looked at. This is particularly necessary in the present case, because the parties appear to have used "penalty" and "liquidated damages" in a perfectly vague way. For instance, I find in the same contract that the efficiency of the machinery to be supplied is to be judged by the percentage of acetone it recovers; and when the parties write their letters with regard to this each of them calls the sum to be paid per unit of 1 per cent. less or more of acetone recovered a "penalty." That, however, seems clearly a case of pre-estimate of the damage for every 1 per cent. less or more of acetone recovered. Another clause says that the plaintiffs guarantee the efficiency of the machinery "under an agreed penalty as liquidated damages." I am quite clear that those who negotiated this contract drew no distinction between penalty and liquidated damages, and did not understand the legal difference between the two expressions. I therefore attach little importance to the fact that in the clause under consideration the word "penalty" is used, and I turn to the substance of the matters. The second matter referred to by Lord Dunedin in the *Dunlop* case (1) is, that "the essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage"; and then he added (2): "it is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties." We accordingly begin with this, that it does not matter whether the parties call the sum "penalty" or "liquidated damages," and if we find the case is one where it is difficult to estimate the damages occasioned by a breach of the contract, it is extremely probable that the parties will save a long and complicated inquiry by fixing an amount as an estimate of the damage. In many cases a man before entering into a contract wishes to know for what he is to be liable if he breaks it, and so he agrees a sum to be payable by him in

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(1) [1915] A. C. 79, 86.

(1) [1915] A. C. 79, 86. (2) [1915] A. C. 87.

that event. That obviously has nothing to do with figures fixed in terrorem. It does not say to the contracting party "you will be punished if you break this contract," it says "if you take this contract you will for a breach of it have to pay so much." In this case it appears to have been the defendants who introduced the question of the 20*l.* per week as a guarantee for the work being completed within the time stipulated. The phrase is: "They asked for a guarantee." That is unintelligible if they can recover all the damage they have suffered. A contract to pay 20*l.* per week guarantee, and a right to receive 10*l.* a week bonus, is nothing like my idea of a penalty, whose object is to punish. It looks like an agreement fixing the amount of damages to be paid by the plaintiffs if they are in default.

We have had various circumstances submitted to us on the point as to how far the parties could know what the damage would probably be. This seems to show that the actual damage would be difficult to arrive at; various estimates were suggested; but in view of the difficulty of fixing the amount it seems to me to have been a reasonable thing for the parties to agree a figure, and in this case the figure was suggested by the defendants. I have come to the conclusion that this case comes within the rule laid down by Lord Dunedin, following earlier cases, that if the parties agree a figure fixing the amount for breach of one stipulation varying with the time of the delay, it is not a penalty but is liquidated damages. I do not decide that a party is always bound by the figure mentioned from recovering a larger sum: it turns upon whether the sum mentioned can be said to be an estimate of the damage to be paid for the breach; but I find great difficulty in saying that an estimate less than the actual loss can ever be a penalty in terrorem.

Reference has been made to the charterparty cases. These in my view turn largely upon the history of the particular clause. It is an odd clause which has been in charterparties from time immemorial. The original form was "penalty for non-performance of this agreement estimated amount of freight." The agreement covered all sorts of obligations.

For a long time the clause was in that form. When the question was raised in the Courts they said that the clause was obviously a penalty clause, for how could the sum be liquidated damages for every kind of breach, however small? After a time a slight alteration was made in the form of the clause. It was still left beginning "Penalty for non-performance of this agreement," so that it looked like the old clause, but an addition was made at the end, possibly with the idea that it could be used to limit damages to not more than the estimated amount of freight. An American clause is sometimes used with the still odder phrase: "Not more than the value of the charter." In *Wall* v. *Rederiaktiebolaget Luggude* (1) Bailhache J. said that the clause did not prevent more being given than the estimated amount of freight. When the point was afterwards considered in the House of Lords in *Watts, Watts & Co., Ld.* v. *Mitsui & Co., Ld.* (2), Lord Finlay said that if people desire to turn this old clause into something different they must use clear language. Lord Sumner went further, and said that the clause did not prevent the shipowner or charterer from recovering the actual amount of damage, though it might be more than the estimated amount of freight. That in my view turned largely upon the fact that there was one clause purporting to fix one damage for every sort of breach. Here there is one obligation—namely, to deliver something by a fixed date, and there is a clause fixing a payment which is commensurate with the amount of the delay in the delivery. The phrase "genuine covenanted pre-estimate of damage" does not state it in terms accurately. From the nature of the case the quantifying the amount of damages is so difficult that it is almost impossible to make any accurate pre-estimate; but it is quite sufficient if the parties, knowing that there may be a breach of this sort and knowing further that the damages will be very difficult to assess, say: "We will agree that the damages for breach of this part of the contract shall be a fixed sum varying in its total amount by the extent of the delay." For these reasons I come to the conclusion that the clause now under consideration is not a penalty clause but is an agreement fixing the rate of damages to be paid for default in completing the work within the stipulated time. I quite appreciate that in this case the defendants get a much smaller amount than the actual damage they have sustained, but the answer is that they agreed to it and themselves suggested the amount. In my view Wright J.'s judgment as to the amount of damages was wrong and must be set aside.

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(1) [1915] 3 K. B. 66.

(2) [1917] A. C. 227.

Greer L.J. I have come to the same conclusion. The question is not without difficulty in view of some of the phrases used in earlier cases, but if I look at the formal contract alone for the purpose of ascertaining whether the clause under consideration is an agreement as to liquidated damages, or is a penalty, I should have no hesitation in saying that it is just the ordinary clause of a contract for work and labour with a provision stipulating the amount to be paid in the event of delay in completing the contract. Over and over again the Courts have held that clauses of this kind, which are inserted to fix an amount of damages, which being unknown at the date of the contract being entered into has to be estimated, are to be read not as penalty clauses but as fixing the liquidated damages.

In this case it seems clear that there might be many events which the parties could not foresee, and which would affect the quantum of damages if there was delay in completion. For example there is a term which provides that "should the 85 per cent. not be obtained"—that is the guaranteed amount of recovery—"we to be allowed a further six months from the end of the second test in which to make the plant good for this efficiency; failing this we to remove the plant from your works." The contract, therefore, itself contemplates that after the machinery has been installed it may be necessary for the contractors still to be doing work on the plant which would inevitably reduce its value to the defendants during the time the work was in progress. In that respect there would be uncertainty as to the amount of the damages, and this made it desirable for the parties to agree in advance what should be payable in the event of delay. Another consideration leads me to the same conclusion. That is this: though the defendants had ordered the new plant which was to be delivered within eighteen working weeks, every one knows that it is not uncommon for such contracts not to be completed within the time stipulated, sometimes, it may be, by reason of the default of the building owner, sometimes by reason of the default of the contractor, and the damages during the earlier part of the delay might be very small, while the damages during the later part might be considerable. It seems reasonable in those circumstances that the parties who cannot agree a lump sum for delay, inasmuch as the amount to be paid ought to depend upon the length of the delay, should agree upon some average which will represent their estimate of the damages. In addition to that there are other considerations to be taken into account—matters affecting the market in the product which might affect the amount of the damages; and in those circumstances it seems reasonable that the parties, if they are sensible, should come to some agreement in advance as to the sum to be paid by way of damages.

So far I have dealt with the case on the interpretation of the contract itself, but both parties have sought to utilize the communications passing between them before the formal agreement was signed, as part of the circumstances which can be used to interpret the agreement. I assume, without deciding it, that this is permissible as showing what were the facts and circumstances known to both parties at the time they concluded the contract. There was a preliminary tender on February 16, which was followed by a conversation. In that preliminary tender the offer was subject to condition 10 in these terms: "Completion and penalty for delay: The times given for delivery and completion are to date from receipt by us of a written order to proceed, and of all the necessary information and approval of drawings to enable us to put the work in hand. We will use our best endeavours to keep to the dates given, but will accept no liability for failure to do so." That was not acceptable to the defendants, and the matter was then discussed between the representatives of the two parties. The defendants said they required the work to be completed in eighteen working weeks, to which the plaintiffs replied that if they had to complete within that time they would have to put on a night shift, and would require an advance of 500*l.* on the amount of their tender. But no complete bargain was made. The defendants said that in those circumstances they would want a guarantee of 20*l.* a week for the delay. At the time this was not accepted by the plaintiffs. Later, the plaintiffs wrote: "We would like to draw your attention to clause 7, cost of plant. As you are no doubt aware, we modified our price to 19,250*l.* without penalty but seeing that you require this plant delivery and erecting in eighteen working weeks we have put on a further 500*l.* to compensate us for working night and day, making the price of 19,750*l.* We hope these conditions are favourable to you, and look forward to receiving your official order within the next day or so." In that letter they added this: "We might add that we have further important contracts pending, and if the eighteen weeks' delivery is to be maintained, we shall have to proceed with all speed to satisfy your good selves." The plaintiffs had previously written with special reference to the question of penalty: "We are prepared to take the job on at a penalty of 20*l.* per week and a bonus of 10*l.* a week if erected under the time stated." No one could contend that the 10*l.* bonus was a penalty, and the two sums are to be as parallel sums—20*l.* penalty the plaintiffs were willing to agree as the damages payable if they did not complete the work in time, and 10*l.* per week they should receive as bonus if the work was completed in a shorter time. The bonus is not a penalty, and that is an indication that the two sums are to be regarded as of the same character. The result of these communications seems to be this, that the defendants for their own benefit wanted a certain penalty of 20*l.* inserted in the contract, and they wanted to be able to say: "We need not inquire into the amount you are to pay us; it may be difficult to estimate at the present time, but if you are willing to agree to 20*l.* we will allow the contract to go through at the increased price you have quoted to us." So far from supporting the argument that this sum was intended to be a penalty and to have no effect except as a warning, I think it supports the view that I have indicated as the correct interpretation of the contract. It supports the view which is favourable to the plaintiffs, that this sum was to be the agreed amount of damages where it was impossible to know beforehand whether these would be large or small, or what the events would be which would determine their amount. I agree therefore that the clause in question is to be treated not as a penalty clause but as one agreeing a pre-estimate of the damages that would be suffered if there was delay. I have put my judgment entirely on this ground, though there is something to be said for the view expressed in Mayne on Damages, 10th ed., p. 134, that the whole origin of the right to object to the recovery of a penalty is the equitable doctrine that a plaintiff suing for a penalty would be restrained by the Court of Chancery from seeking to enforce it in respect of any figure beyond the amount of the actual damages, and that it has no application to the case where the alleged penalty is something less than the actual damages. But if I had to decide the case on that ground I should require a little more time to consider my judgment and to investigate with considerable care the somewhat doubtful origin and history of the law with regard to the enforcement of penalties.

SLESSER L.J. I agree that this appeal should be allowed. The case raises a question of importance; one on which, as I understand the argument for the respondents, there is no direct authority to guide us. The position is this: Wright J. has found that the actual loss incurred by the non-completion of the contract within the stipulated time was ten times the penal sum, and he goes on "and was, I think, well within the reasonable contemplation of the parties who could have formed a reasonable pre-estimate of probable loss." So that we have a case where it is common ground that the actual damage sustained is considerably larger than the sum—20*l.* per working week—which in paragraph 10 of the conditions of the contract is the amount to be payable by way of penalty. The defendants in fact counterclaimed 16,000*l.*, and said that the damages fixed in the contract at 20*l.* per week are a penalty which must be treated as unenforceable, and consequently they, the defendants, are entitled to the whole of the damage they have suffered. On such an argument we are bound to consider what is meant by the word "penalty" in those circumstances. It is unnecessary to indulge in minute historical researches, because in *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.* (1), the House of Lords, and particularly Lord Dunedin, set out the chief principles which should guide the Court in deciding what is and what is not a penalty. Lord Dunedin there said (2): "The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage." It is quite impossible, in my view, to say that where the parties have agreed that the damage payable shall be very much less than the amount which would be payable if there were no such agreement; where the agreement is, on the face of it, limiting the damage and not imposing a penalty upon the offending party, such a limitation can be said to be in terrorem of the offending party. If it is anything, it is a provision for his benefit. He who has broken the contract is to pay considerably less and not considerably more than would have been the case had no such arrangement been made. I would also refer to a second passage in the speech of Lord Dunedin in the same case, where he quotes an illustration given by Lord Halsbury in *Clydebank Engineering and Shipbuilding Co.* v. *Don Jose Ramos Yzquierdo Y Castaneda* (3) and says (4): "It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach." Now, it is an obvious absurdity to say, in a case where the offending party has

(1) [1915] A. C. 79.
(2) Ibid. 86.
(3) [1905] A. C. 6.
(4) [1915] A. C. 87.

limited his damage, that that limitation, which can only benefit him, can be either extravagant or unconscionable. The passage just quoted together with the earlier one points to the fact that Lord Dunedin, and indeed the whole House, were considering the case where a penalty is placed upon a breach which is greater than the sum which would naturally, according to the ordinary rules, flow from the breach, and notwithstanding certain doubts which are thrown upon the generally accepted view as to this doctrine that penalties are not to be enforced—doubts thrown out by Sir George Jessel M.R. in *Wallis* v. *Smith* (1)—the current of authority tends to the conclusion, and certainly most of the commentators—particularly Sir Frederick Pollock—take the view, that it is an application of the general equitable doctrine that a man shall not be called upon to pay more by way of damages than those which flow normally from the breach. Sir Frederick Pollock in his Principles of Contract, 9th ed., says this (p. 551): "This applies not only to securities for the payment of money but to all cases 'where a penalty is inserted merely to secure the enjoyment of a collateral object.'" Having regard, however, to some differences of opinion in the past as to the origin of this doctrine, I might have hesitated to express a view upon it were it not for the clear language of Lord Dunedin in the *Dunlop* case (2), and in my opinion it is to misconceive the whole law on the subject to say that what is called a "penalty" is to be unenforceable in a case where the amount to be paid is less than the amount which would have been payable if such a provision had not existed. In *Watts, Watts & Co., Ld.* v. *Mitsui & Co., Ld.* (3), Lord Finlay said this (4): "If this clause"—he was speaking of a special clause in charterparty cases—"had appeared for the first time I think it might have been construed as imposing a limitation on the damages to be recovered." In the present case the clause under consideration is a greater limitation of the damages to be recovered, and that being so, one cannot perhaps take the view that it is a pre-estimate of the damage, because being a limitation it is possible that it might be said to be a limitation of the pre-estimate; that is to say, the parties may, and it is perfectly open to them to do so if they please, agree that the party who is to suffer from the breach will accept as damages a sum less than that which would have been payable on a pre-estimate. The question of the amount being unconscionable, exorbitant, or extravagant does not arise. All these questions are very material when the amount agreed upon is very much larger than the amount flowing from the breach, and are reasons for assuming that what was intended by the parties was a penalty. But when the sum is less, I think it is reasonable to assume that the parties intended to limit the damages to a certain amount, and that is an agreement perfectly within their power to make. It neither invades any equitable doctrine on the ground of unconscionableness, nor, if we take the view expressed by Sir George Jessel M.R. in *Wallis* v. *Smith* (1), does it lead to an absurdity, but on the contrary is a very reasonable and natural thing.

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(1) (1882) 21 Ch. D. 243.
(2) [1915] A. C. 79.
(3) [1917] A. C. 227.
(4) Ibid. 235.

I only desire to add that I do not think that although the word "penalty" prima facie means what it says, yet, as was said in *Wallis* v. *Smith* (1), "in the construction of written instruments you may depart from the literal meaning of the words, if reading the words literally leads to an absurdity." To read the word "penalty" in this contract literally would lead to an absurdity, as it cannot be a penalty if the person is benefiting. In fact, this is a benefit to the person breaking the contract, and does not penalize him in any way. We may therefore properly read the expression as intended to be liquidated damage. I think so for yet another reason—namely, because in the contract itself the parties in another clause use the language "an agreed penalty as liquidated damages," and in the correspondence, if one may refer to it—a matter as to which I have some doubt—they speak of the sum being a penalty simpliciter, dealing with the same subject-matter which they refer to as a penalty being liquidated damages. It is clear that those words are not used here as words of art; they are used as interchangeable, and when one looks at the real intention of the parties, I think their intention was to limit the damages, which they have done in the clause in question, and the limitation there expressed is the maximum of damage in this case which the defendants are entitled to receive.

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(1) 21 Ch. D. 243, 257.

Appeal allowed.

Solicitors for plaintiffs (appellants): *Hall, Brydon & Chapman.*

Solicitors for defendants (respondents): *Gedge, Fiske & Co.*

J. S. H.

C. A.
1931
June 8.

ELDRIDGE AND MORRIS *v.* TAYLOR.

[1931. E. 362.]

Money-lender—Loan—Fresh Agreement by Borrower—Failure by Money-lender to send Note or Memorandum in Writing—Moneylenders Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 21), *s.* 6, *sub-s.* 1.

By the Moneylenders Act, 1927, s. 6, sub-s. 1, it is provided that "no contract for the repayment by a borrower of money lent to him . . . . by a moneylender after the commencement of this Act or for the payment by him of interest on money so lent and no security given by the borrower . . . . in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract. . . . ."

The male defendant borrowed, by promissory note, money from the plaintiffs, a firm of money-lenders, and agreed to repay the same by monthly instalments. In this transaction the requirements of s. 6 of the Moneylenders Act, 1927, were duly complied with. The borrower made default in paying the instalments, whereupon the plaintiffs issued a writ to recover the amount. Negotiations then took place, and in the result an arrangement was made by which the male defendant and the second defendant (his wife) gave the plaintiffs a joint and several promissory note in respect of the amount unpaid on the first promissory note, an amount for interest, and certain agreed costs. A memorandum of this contract was signed by both defendants, but no copy was sent to them within seven days, as required by s. 6 of the Act of 1927. The amount of the promissory note not having been repaid on the due date, the plaintiffs sued the defendants to recover the same:—

Held, (1.) that although the contract sued on was a substituted agreement for, or a variation of, the original contract entered into by the male defendant, it was nevertheless a contract "for the repayment by a borrower of money lent to him" within s. 6; (2.) that as a copy of the contract had not been sent as required by that section, the contract was unenforceable against the male defendant; (3.) that it was likewise unenforceable against the female defendant inasmuch as it appeared that she signed the promissory note solely as a surety, and the male defendant not being liable she also was discharged from liability.

Hyams v. *Stuart King* [1908] 2 K. B. 696 distinguished by Greer L.J.

APPEAL from a decision of Rowlatt J.

The plaintiffs, who were money-lenders, advanced a sum of 100*l.* to the defendant, Lancelot Taylor, on his promissory note, dated February 27, 1930, which made the loan repayable by monthly instalments of 8*l.* 6*s.* 8*d.*, commencing on March 27, 1930, with interest at 48 per cent. per annum. The promissory note provided that on default in payment of any instalment the whole amount remaining unpaid should become due and payable forthwith. In connection with this loan the provisions of s. 6 of the Moneylenders Act, 1927 (1), had been duly complied with by the plaintiffs.

Default having been made in the repayment of the sixth instalment of the loan, the plaintiffs issued a writ on November 20, 1930, to recover the amount due with interest —71*l.* 18*s.* 4*d.* On December 10 the plaintiffs took out a summons for judgment under Order XIV., but an adjournment was granted, and, negotiations having taken place, an arrangement was made under which the defendant, Lancelot Taylor, and his wife gave the plaintiffs a joint and several promissory note for 91*l.* 9*s.* 8*d.* dated December 17, 1930, and payable on January 31, 1931, this sum being made up of the unpaid balance of the first promissory note, interest, and a sum of 12*l.* 12*s.* agreed costs. A memorandum of that contract was signed by both husband and wife. Payment not having been made on the due date, the plaintiffs issued a writ on March 3, 1931, against both husband and wife to recover the sum of 91*l.* 9*s.* 8*d.* with interest. In connection with the promissory note thus sued on the formalities of s. 6 of the Act of 1927 as to sending a copy of the note or

(1) See headnote.

memorandum in writing of the contract within seven days to the borrowers had not been observed.

At the trial of the action Rowlatt J. gave judgment for the defendants on the ground that the requirements of s. 6 of the Act of 1927 had not been complied with.

The plaintiffs appealed.

Doughty K.C. and *R. F. Levy* for the appellants. Rowlatt J. was wrong in holding that the requirements of s. 6 of the Act of 1927 had to be observed in connection with the new agreement. The arrangement come to was not a loan; no money was lent to Mrs. Taylor. If at the initiation of a loan the borrower is given a copy of the note or memorandum of the contract that is all that is necessary; no copy of any variation of the original contract need be given, certainly not where there is no new loan.

Further, the agreement of December 17, 1930, was not a promise to repay the original loan. That is borne out by the fact that the agreement of that date included not only the balance unpaid of the original promissory note, but a sum for costs. The agreement was a promise to pay for rights which had supervened. In other words, it was the price paid to obtain freedom from a judgment. Therefore the principle of *Hyams* v. *Stuart King* (1) exactly applies.

[They also referred to *Callisher* v. *Bischoffsheim*. (2)]

Hemmerde K.C. and *Shackleton Bailey* for the respondents were not called upon.

SCRUTTON L.J. This is an appeal in an action brought by a firm of money-lenders to recover money lent and interest. For reasons which appeared to it satisfactory, Parliament has put money-lenders under the strictest regulations, and it is not for us to consider whether that policy is right or not. Sect. 6 of the Act of 1927 provides that certain contracts for the repayment of money lent and certain securities for the repayment of money lent shall be invalid unless a note or memorandum of the contract is made and

(1) [1908] 2 K. B. 696.

(2) (1870) L. R. 5 Q. B. 449.

signed personally by the borrower, and unless a copy thereof is delivered or sent to him within seven days of the making of the contract. Parliament has apparently thought that the borrower should be protected by having in his possession a copy of the writing he has signed.

The facts are these: the male defendant borrowed from the plaintiffs in February, 1930, 100*l.* payable by monthly instalments of 8*l.* 6*s.* 8*d.*, commencing on March 27. Like many other borrowers the male defendant did not comply with the contract; he was continually in arrears, with the result that on November 20, 1930, a writ was issued against him for 71*l.* 18*s.* 4*d.* Thereupon negotiations took place, and as a result a substituted agreement or a variation of the agreement was made whereby the borrower agreed to pay the whole amount of the debt on January 31, 1931, and his wife also agreed to pay the amount on the same date, the promissory note given by them stating that "we jointly and severally promise to pay," the amount. The wife was obviously joined as a surety for her husband, but while the promissory note was given and while the document required by s. 6, sub-s. 1, of the Act of 1927 was signed by the husband and wife, no copy thereof was delivered to them, as required by the section, within seven days of the making of the agreement. The amount not having been paid on January 31, 1931, a writ was issued to recover the same, but the husband and wife took the point that the contract was invalid, because of the failure to send them a copy of the written contract. The language of the Act is clear, that "no contract for the repayment by a borrower of money lent to him . . . . by a moneylender . . . . shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract. . . ." The contract of December 17, 1930, is a contract to repay a sum of money, the greater part of which had been lent to the husband. The case thus comes within the exact words of the section. It is quite true that there is something else in the agreement, for in addition to the obligation to pay the money lent, there is an agreement to pay interest thereon and an agreement to pay certain agreed costs. But the fact that there is something in the contract besides an agreement to repay the money which had been lent does not, in my opinion, take the case out of the Act. The result is that, as far as the husband is concerned, the contract is unenforceable owing to the failure of the money-lenders to send him a copy of the contract.

As I have said, the contract of repayment is joint and several, and if the one party cannot be sued neither can the other. Further, the wife was merely surety for the husband, and if the debt of the principal is gone, the surety is also discharged; consequently the action cannot be maintained against the wife. I am inclined to think that she comes within the word "borrower," although I do not wish to be taken as deciding this. But on the point about the wife being a surety I am quite clear. Rowlatt J. therefore came to a right conclusion, and the appeal must be dismissed.

GREER L.J. I am of the same opinion. Acts of Parliament which are intended to protect borrowers against fraudulent or harsh and unconscionable money-lending contracts sometimes result in protecting fraudulent and dishonest borrowers. But if the statute has that effect we must follow its words without regard to the consequences. This is one of those exceptional cases. There is no doubt that it is a dishonest act on the part of the two defendants to refuse to pay that which they agreed to pay. The original transaction of loan appears to have been unchallengeable. There was no answer to the first action brought, and a concession was made by the money-lenders, who gave better terms than those to which the male defendant was entitled, provided he got the additional responsibility of the second defendant, his wife. The parties were of age, they knew exactly what they were doing, and now they take the point that because s. 6 of the Act of 1927 has not been complied with they are not liable. The sole question is whether that section applies. In my opinion it clearly does. The original transaction not having been carried out by the husband, an action was brought against him, and the form of the claim makes it quite plain that the action was one by money-lenders for the balance of money lent and interest due. In those circumstances, when the plaintiffs wanted to get judgment, the agreement which we have to consider was entered into; a joint and several promissory note was signed by the two defendants; and a memorandum of that contract was signed by them as required by the Act, both parties being aware that they were dealing with a contract for the repayment of money by a borrower. Apparently nothing was done with regard to disposing of the action at that time, but I assume that it was an implied term that the action should not be further pursued and should be stayed. A question might arise whether if the new agreement was not performed that action could not be proceeded with, but we have not to deal with that question. The question for us is simply this: is this a contract for the repayment by a borrower of money lent? The action was brought because the borrower had borrowed money and because the lenders wanted to recover the amount lent. In respect of their liability this promise was made by the defendants. It is not, as it might have been, a contract under which money has been borrowed with no contract for its repayment by the borrower. So far as the male defendant is concerned it is quite clear that it was a contract by the borrower to repay with interest money which he had borrowed. It is quite true that there were other matters in the agreement arrived at, but that does not prevent the contract being one for the repayment of money borrowed. I was for a time a little impressed by the argument of Mr. Levy that the real transaction was not an agreement for the repayment of money lent but was an agreement entered into to purchase freedom from judgment in the first action. That is an ingenious argument, but it does not deal with the real question in this case. *Hyams* v. *Stuart King* (1) was cited and relied on as a parallel case, but in my view it is not parallel, for there no money was due because the betting debt could not be enforced, and the only transaction that took place which the Court was asked to enforce was a transaction in which freedom from the likelihood of action by Tattersall's was bought at a certain price. That and that alone was the contract entered into. Here it is clear the contract was one for the repayment by the borrower of money lent; it was a substituted promise for repayment of the very money in respect of which the action was brought, and this action was brought to recover that money.

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(1) [1908] 2 K. B. 696.

With regard to the female defendant I think the money-lenders knew perfectly well that the money had been borrowed by the husband, and that to enable them to get the money from him they insisted upon the wife being added as a surety. Inasmuch as if time had been given to the principal debtor the surety would have been released, so by omitting to give the principal debtor the proper document under s. 6 of the Act of 1927 the plaintiffs having failed against the principal debtor they fail likewise against the wife. For these reasons I agree, although with some regret, that the appeal must be dismissed.

SLESSER L.J. I agree. The plaintiffs' claim against the defendants is as makers of a joint and several promissory note and, alternatively, for money due under a contract in writing dated December 17, 1930. To that claim the defendants pleaded that no note or memorandum in writing of the contract had been delivered or sent to them within seven days of the making of the contract, as required by s. 6 of the Act of 1927. In fact no such copy was delivered or sent to the defendants. It is said, however, on behalf of the plaintiffs that the agreement made on December 17, 1930, and the promissory note of the same date were the result of the compromise of an action and that there was not any borrower for the repayment of money advanced to him, and therefore that the transaction was outside s. 6. In my opinion the contract is clearly one for the repayment by the borrower of money lent to him. It states the amount, which is composed of the amount unpaid under the original promissory note, together with interest, and certain costs. So far as regards the original sum on the note and interest, that clearly was the sum which was agreed to be paid by the agreement, as it had been by the original agreement made by the male defendant. To that was added a certain sum for costs. Whatever be the consideration for the making of that contract it is none the less an agreement for the repayment of money lent to the male defendant. It was argued that the words of the section are limited to a contract made at the time of the loan, and inasmuch as in this case the loan was made some time before the contract entered into by the male and female defendant, s. 6 is said to have no application. I cannot so read the section. No words of limitation appear in it. The mere fact that a new agreement was substituted, or the old agreement was varied, does not take the case out of the section. If that be so it concludes the case against the male defendant. As to the female defendant I think that, to the knowledge of the plaintiffs, she was added as a surety and for no other purpose. We are entitled to look at the substance of the transaction, and doing so, I think it is clear that the wife was only to be liable as a surety, and if the principal debtor is not liable the surety cannot be liable either. The husband is protected from liability owing to the omission by the plaintiffs to comply with the requirements of s. 6; so too the wife is protected.

Appeal dismissed.

Solicitors for appellants: *Davis & Taylor.*

Solicitors for respondents: *Lloyd & Davey, for R. E. Fieldhouse, Manchester.*

J. S. H.

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Feb. 17;
March 6.

MAYHEAD *v.* HYDRAULIC HOIST COMPANY, LIMITED.

[1929. M. 341.]

Practice—Mode of Trial—Order on Summons for Directions—Order for Trial with Jury—Scientific Investigation—Trial Judge—Power to order Trial by Judge alone—Rules of Supreme Court, Order XXXVI., *rr.* 1, 5.

Under Order XXXVI., rr. 1 and 5, of the Rules of the Supreme Court, a judge in charge of the list of cases for trial with a jury has power to alter an order made under r. 1 for trial of a case with a jury, and may order the case to be tried by a judge alone if in his opinion the case requires scientific investigation which cannot conveniently be made with a jury. He may make this order at his own instance, after hearing the parties, but without any summons or notice under r. 1 and without the application or assent of either of the parties.

Appeal from an order of Horridge J. directing trial of the action before a judge without a jury in the following circumstances.

The plaintiff by his writ claimed damages for fraudulent misrepresentation, negligence, and breach of warranty in and about the sale by the defendants to the plaintiff of a motor vehicle and accessories. In his statement of claim he alleged that he was a driver of motor lorries; that on or about August 10, 1928, he called at the defendants' place of business in Brixton Road proposing to purchase from them a Peerless motor lorry; that the defendants then represented to him that the motor lorries which they supplied to purchasers were thoroughly examined and reconditioned, having all worn and defective parts removed and new parts substituted which had been made by the manufacturers of each lorry, and were properly fitted by the defendants; that the lorries so reconditioned were in first class working order and were guaranteed by the defendants for six months; that relying upon these and other representations the plaintiff by a letter dated August 11, 1928, ordered one of the defendants' reconditioned lorries, and that the defendants accepted the order by a letter of August 13. The plaintiff further alleged that the defendants induced him to sign a memorandum of agreement dated September 8, 1928, which he signed without reading it and in ignorance of its contents; that he thereupon paid the defendants 270*l.* and received from them a motor lorry. He insisted that the so-called memorandum of agreement was a fraud upon him and was part of a system of fraud practised by the defendants whereby they induced persons of small means to obtain the defendants' motor lorries never intending to carry out the terms of any guarantee they might have given and knowing that the lorries would be unable to do their work, expensive to run, and liable to break down frequently; and whereby, when purchasers who may have paid deposits are unable to keep up the payments provided for in the memorandum of agreement, the defendants claim to retake the lorries and retain the payments previously made.

With regard to the lorry which he had purchased the plaintiff alleged that it had not been reconditioned thoroughly or at all; but that it was (*a*) not in proper working order; (*b*) not supplied with new working parts; (*c*) not supplied with parts of Peerless make; (*d*) not supplied with parts which properly fitted each other or the lorry; (*e*) that it was ill adjusted and in bad and worn out condition; (*f*) not fitted to do the work of a Peerless motor lorry in good condition; (*g*) uneconomical in doing such work as it could do; (*h*) incapable of continuous work; and (*i*) generally badly put together and patched up, old, worn out, broken down and useless for the purpose for which it was required and supplied. The plaintiff claimed repayment of the sum of 305*l.* 6*s.* 3*d.* paid by him to the defendants in respect of the lorry.

On July 10, 1929, the defendants obtained an order for particulars of the six allegations under the headings (*a*) to (*g*) inclusive, which are mentioned above. In compliance with the order the plaintiff delivered lengthy particulars largely of a technical character. The defendants by their defence put in issue the plaintiffs' allegations of fraud and all the particulars delivered by him as above mentioned.

On May 6, 1929, on a summons for directions an order had been made for trial of the action in Middlesex with a judge and a common jury. On March 5, 1930, an order was made by Master Ball that, notwithstanding the order on the summons for directions made on March 6, 1929, the action should be removed from the common jury list and should be tried by a judge and a special jury at the defendants' instance.

On February 3, 1931, the case appeared third in the list of cases to be tried by Horridge J., who was the judge having charge of the list of cases for trial with a special jury. The learned judge, being of opinion that the case, in view of the technical character of the particulars delivered by the plaintiff, required scientific investigation, of his own motion without the application of either party and against the protest of counsel for the plaintiff, ordered the case to be transferred to the non-jury list.

Against this order the plaintiff appealed.

Hanworth for the appellant. The learned judge had no power to order trial of this case by a judge without a jury. By Order XXXVI., r. 1, of the Rules of the Supreme Court (1)

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(1) Rules of the Supreme Court, Order XXXVI., r. 1: "The order made on the summons for directions in every cause or matter, and every order giving leave to defend under Order XIV., shall direct whether the cause or matter is to be tried with a special jury, or with a common jury, or without a jury (whether by a judge or otherwise), and shall also direct where the cause or matter is to be tried, but the mode and place of trial so directed may be subsequently altered for sufficient cause on a summons or a notice under the summons or order for directions issued by either party without any appeal from the former direction. If the mode or place of trial is so altered the cause or matter shall thereupon be transferred to the appropriate list."

Rule 2: "In every cause, matter or issue, unless under the provisions of r. 6 of this Order a trial with a jury is ordered, the mode of trial shall be by a judge without a jury; provided that in any such case the Court or a judge may at any time order any cause, matter or issue to be tried by a judge with a jury, or by a judge sitting with assessors, or by an official referee or special referee with or without assessors."

Rule 3: "Causes or matters assigned by the Act" (i.e., the Supreme Court of Judicature Consolidation Act, 1925) "to the Chancery Division shall be tried by a judge without a jury, unless the Court or a judge shall otherwise order."

Rule 4: "The Court or a judge may, if it shall appear desirable, direct a trial without a jury of any the order made on the summons for directions shall direct how the case is to be tried. In this case the order provided for trial by judge and a common jury. Rule 1 of Order XXXVI. goes on to provide that the order first made may be subsequently varied for sufficient cause on a summons or notice. That was done in the present case, and a subsequent order was made for trial with a special jury. The only power given by r. 1 to alter an order for trial once made is by means of a summons or notice under that rule. No mention is there made of any power in a judge at a trial, still less in a judge before a case is called on, to alter the mode of trial. Rule 2 of Order XXXVI. prescribes that, unless a trial with a jury is ordered under r. 6, the mode of trial is to be by a judge without a jury, implying that where an order is made under r. 6 for trial with a jury, the trial shall not be by a judge alone. Rule 6 provides that in any cause or matter other than those mentioned in rr. 3 (Chancery matters), 4 (issues arising in an action), or 5 (matters requiring prolonged examination of documents, accounts, or local or scientific investigation) any party may apply for trial with a jury. Rules 3 and 4 are not material in this case. An order having been made for trial with a jury, the respondents cannot be

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question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which immediately before November 1, 1875, could, without any consent of parties, have been tried without a jury."

Rule 5: "The Court or a judge may direct the trial without a jury of any cause, matter or issue requiring any prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in their or his opinion conveniently be made with a jury."

Rule 6: "In any cause, matter, or issue other than those mentioned in rr. 3, 4 and 5 of this Order, upon the application (not later than ten days after the close of the pleadings or where there are no pleadings at the time of or within ten days after the order directing the mode of trial) of any party thereto for a trial with a jury of the cause, matter, or issue, an order shall be made for a trial with a jury."

Rule 7: "Subject to the provisions of the preceding Rules of this Order, the Court or a judge may, in any cause or matter, at any time or from time to time, order that different questions of fact arising therein be tried by different modes of trial, or that one or more questions of fact be tried before the others, and may appoint the places for such trials, and in all cases may order that one or more issues of fact be tried before any other or others."

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heard to say that this is a case coming under r. 5. Therefore no order on summons or notice could be made in this case by a Master or judge in chambers for trial by a judge alone, and in this matter what cannot be done by a Master or judge in chambers cannot be done by a judge at the trial.

Birkett K.C. and *Fox-Andrews* for the respondents. It may be conceded that if the order for a jury in this case had been made under r. 6 of Order XXXVI., a subsequent order could not have been made in chambers under r. 5 for trial without a jury. But that was not what happened. The order for a jury was not made under r. 6, but was made under r. 1 on the general summons for directions. An order for trial with a jury made under r. 1 may be subsequently altered by the Court or a judge "for sufficient cause" under r. 1 itself; and no valid reason can be given why it should not be altered under r. 5 if the case requires a scientific investigation which cannot conveniently be made with a jury. A judge is not less a judge when sitting in open Court than when sitting in chambers.

Hanworth in reply.

Cur. adv. vult.

March 6. The following written judgments were delivered:—

SCRUTTON L.J. This appeal raises troublesome questions as to the circumstances under which a trial judge may dispense with trial by a jury against the wish of one of the parties. It arises in this way: The plaintiff Mr. Mayhead entered into a hire-purchase agreement for a second-hand "reconditioned" Peerless lorry from the defendants, the Hydraulic Hoist Company. He was very dissatisfied with it when he got it, and alleged it was defective in many respects, and certainly not "reconditioned." He was in the difficulty that the agreement which he signed contained a statement that he had examined it and was satisfied with its condition and running, and that no warranty, description, or representation as to its state was given or implied. To escape this difficulty he alleged: (1.) that the agreement was obtained by fraudulent representations and was itself a fraud on the hirer and purchaser, and (2.) he added in support of this allegation another, that the defendants' whole system was fraud on hire-purchasers, and that by means of it they intentionally procured hire-purchasers to pay money for worthless lorries. He gave two names as particulars under the latter allegation, and proposed to give more names after discovery. He gave a long list of defects in his own lorry, and in its working.

Before pleadings were delivered an order was made by the Master on the summons for directions for trial with a common jury. The defendants never asked for trial without a jury, but, after pleadings delivered and notice of trial given, applied for and obtained an order for a special jury. The case was third in the day's list for trial before Horridge J., the judge in charge of the special jury list. As far as the parties were concerned, the case would have been tried with a special jury, but the learned judge had been looking at the pleadings, and came to the conclusion that, in view of the lengthy particulars of mechanical defects and bad running and of the allegations as to defects in other lorries, the case was one which was taken out of the class of cases in which under Order XXXVI., r. 6, the plaintiff was entitled to a jury, and fell into the class of cases in which, under Order XXXVI., r. 5, the "Court or a judge" might, because in his opinion the case required "scientific investigation," on his own initiative direct a trial without a jury. Accordingly, without any application by either party, the judge informed the parties, before the case was reached, of his view, and that he proposed to send the case to an Official Referee. Neither party desired this. Counsel for the plaintiff vigorously demanded that his jury should be retained; counsel for the defendants, in answer to the judge, while objecting to go to an Official Referee, said that in his view it was not a proper case for a jury. Thereupon the judge on his own motion transferred the case to the non-jury list. The plaintiff appeals.

Order XXXVI., r. 6, gives either party to an action, in cases which do not come within rr. 3, 4 or 5 of that Order, a right to a jury. In the words of r. 6 "an order shall be made for a trial with a jury." Since the War the right to a jury has been made more absolute by a series of Acts and Rules, set out in the Yearly Practice, pp. 559 to 561, and explained by this Court in *Ford* v. *Blurton.* (1) But the decision of the majority of this Court in the *Kodak* case (2) shows that in a case which would ordinarily come within r. 6 the Master may deprive the party of his right to a jury in an application under Order XIV., though the case is such that he cannot give judgment under that Order, and is such that, apart from any question under Order XIV., the defendant would have a right to a jury, by directions given under rr. 6 and 8, whereby the case is put in the Short Cause List on the terms that it shall be tried without a jury.

In "short cause" cases the trial judge frequently finds at the trial that the case is not a short cause. I am aware of one case where an action between Italians for damages for fraudulent oral representations on the sale of an ice-cream business was put in the Short Cause List. All the witnesses were Italians examined through an interpreter, and the case took three days to try. Not infrequently the judge declines to try such a case as a short cause, and sends it into one of the ordinary lists. I do not know any express rule authorizing this, but I take it to be justified by the inherent right of the trial judge to give such directions as will insure a proper trial of the case before him, having regard also to the proper trial of other cases which would be delayed by a preference in time given to the "short cause."

In the present case the question appears to be whether the trial judge can, if he has reason to believe that the case comes within the class of cases mentioned in Order XXXVI., r. 5, act on this rule, although there is an existing order for trial of the case by a jury, and neither party applies to him to vary that order.

The Rules in Order XXXVI. and the statutes are not very consistently worded. Sect. 88 of the Supreme Court of Judicature Consolidation) Act, 1925, makes the power of a judge to

(1) (1922) 38 Times L. R. 801. (2) [1930] 2 K. B. 340.

refer any question arising in any cause or matter to a referee for report, "subject to any right to have particular cases tried by a jury." Sect. 89, giving power to a judge to refer to a referee the whole case for trial, omits those words, but the note in the Annual Practice, p. 2274, under the heading, "May at any time order," treats them as still applicable. Rule 1 of Order XXXVI. provides that an order for mode of trial may be subsequently altered "for sufficient cause" "on a summons or a notice" without the necessity of appealing against the previous order. This rule says nothing about the power of the trial judge to alter the mode of trial on his own initiative. Rule 2 says that the mode of trial shall be by a judge without a jury "unless under the provisions of r. 6 of this Order a trial by jury is ordered." Rule 6 says that an order shall be made for trial by a jury, if claimed by either party within ten days after the close of the pleadings, unless the case comes within rr. 3, 4 or 5. Rule 5 says: "The Court or a judge may direct the trial without a jury of any cause .... requiring .... any scientific .... investigation which cannot in their or his opinion conveniently be made with a jury."

I am of opinion that the trial judge may under this rule, construed with r. 1, alter a previous order directing a trial with a jury, if in his opinion the scientific investigation "cannot conveniently be made with a jury," and can do it of his own motion without an application from either party and against their wishes. In my view the judge cannot be compelled to try a complicated case in a way in which in his opinion, reasonably exercised, justice cannot be done between the parties. His order will be a discretionary order, but, as shown by the case of *Ormerod* v. *Todmorden Mill Co.* (1), will be appealable if there are no reasonable grounds for his discretion. That case was decided at a time when certain judges, particularly on circuit, exercised very freely their power of referring cases to Official Referees, to the great annoyance of clients who came ready to try these cases before His Majesty's judges and were sent away. The judge will of course consider the matter very carefully before he deprives a party of the mode of trial which he desires, without the application of the other party to that effect. He will especially do so when the charge is one of fraud, though, if the person charged is the person who desires to try by judge alone, the allegation of fraud is not so important. The Court of Appeal will be slow to interfere with the exercise of the judge's discretion unless it is clear that there are no grounds for exercising it in the manner complained of.

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(1) (1882) 8 Q. B. D. 664.

In the present case it is clear from the pleadings that considerable scientific evidence will be necessary as to the alleged breakdown of the lorry; and on the question whether, if the lorry broke down, it did so from defects when sold, or from overwork and bad treatment and failure to keep in order after sale. When to this is added the possibility of having to investigate the condition of several other lorries whose history is alleged to show a fraudulent system in the vendors, the case for trial without a jury becomes stronger.

Under these circumstances, while I am not sure that I myself should have dealt with the trial in the same way, and while I am of opinion that the judge's power of acting on his own motion against the wishes of one of the parties should be carefully and sparingly exercised, I cannot say there are no grounds on which the judge could reasonably form an opinion under r. 5 of Order XXXVI. and act upon his opinion. The judge's order must therefore stand and this appeal be dismissed. As however the case was well worthy of discussion, and this Court gave leave to appeal, I think the costs here and, if any, below should be costs in the cause.

GREER L.J. I am of the same opinion. I need not state the circumstances and occasion on which the learned judge made the order appealed from. I adopt what has been said on this aspect of the case by Scrutton L.J. I agree that it is not possible for us to hold that the learned judge had no reasonable grounds for making the order. As a general rule, however, I doubt the advisability of a judge exercising jurisdiction to make an order for trial by judge alone, under r. 5 of Order XXXVI., when the case is in the list, but before it has been opened or even called on. There is always a risk that, though the case presented by the pleadings seems to involve a prolonged examination of documents or a scientific or local investigation, this view may be falsified when the nature of the case comes to be explained when called on; but, as I have said, I am not prepared to hold in this case, if the learned judge had the jurisdiction to make the order, that he had no materials before him on which he could lawfully make it. The important question in the case is whether he had jurisdiction to make the order.

Before the Common Law Procedure Act, 1854, the right to trial by jury was absolute in all cases in the common law Courts. No other mode of trial was provided for. The Common Law Procedure Act, 1854, made certain slight alterations in the law whereby in cases of account, or by agreement of the parties, the common law right to a jury was restricted, and to a slight extent the Court was given control over the mode of trial. The next step was taken by the Judicature Act of 1873, whereby the rights of litigants to insist on any particular mode of trial, and the power of judges to make orders as to modes of trial, became wholly statutory. These matters are now provided for by ss. 88 and 89 of the Supreme Court of Judicature (Consolidation) Act, 1925, and Order XXXVI. of the Rules of the Supreme Court. These provisions form a statutory code determining the rights of parties with regard to the mode of trial and the powers of the judges. The above statement must be read subject to the qualification that special provisions are made with regard to the mode of trial in cases where the writ is specially indorsed under Order III., r. 6, as this Court by a majority decided in *Kodak, Ld.* v. *Alpha Film Corporation, Ld.*, and *Frederick Huth & Co., Ld.* v. *Jackson.* (1)

The only rule under which it was, or could be, argued that the judge had power to make the order he did, was r. 5 of Order XXXVI. It is difficult to reconcile with one another the rules of Order XXXVI. Rule 1 provides that on the summons for directions the order made "shall direct" whether the cause or matter is to be tried with a special jury, or with a common jury, or without a jury; but the mode of trial so directed may be subsequently altered for sufficient cause on a summons or a notice under the summons or order for directions issued by either party without an appeal from the former direction. It would seem from the wording of this rule that if an order be made on the summons for directions it remains a binding and effective order, unless either appealed from or subsequently altered for sufficient cause on a summons or notice under the summons or order for directions. It seems also to involve that it cannot be altered by any other proceeding.

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(1) [1930] 2 K. B. 340.

Rule 2 provides that in every cause, matter, or issue, unless under the provisions of r. 6 of the Order a trial with a jury is ordered, the mode of trial shall be by a judge without a jury, but then goes on to provide that in any such case—which I suppose means in every cause, matter, or issue—the Court or a judge may at any time order trial by a judge with a jury, or by a jury sitting with assessors, or by an Official Referee or special referee with or without assessors. I can only read this rule as meaning that, prima facie, the order made on a summons for directions ought to be an order for trial by a judge alone, but that if the Court or judge dealing with the summons for directions, or at any other time, decides that it ought to be tried in one of the other ways mentioned in r. 2, he may make an order for such one of the modes of trial there mentioned as in his discretion he thinks best.

Rule 5 is in these words: "The Court or a judge may direct the trial without a jury of any cause, matter or issue requiring any prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in their or his opinion conveniently be made with a jury." I read these words as meaning that, notwithstanding anything that has happened on the summons for directions, the Court or a judge may direct the trial to be without a jury if the cause or matter requires prolonged examination of documents, etc., or scientific or local investigation to the effect mentioned in the rule. It seems to me that an order to this effect might be made in chambers by the Court or a judge, after an order for trial by jury had been made in the order for directions, but I do not think the power of a judge to make the order is limited to a case where application is made by summons or notice to vary the order made on summons for directions. I think r. 5 is an over-riding rule giving power to the Court or judge at any time, both before or at the trial, to make the order. It seems to me obvious that this power is given to the Court to make an order that ought to be made having regard not merely to the interest of the two parties to the litigation, but having regard to the interests of the administration of justice generally. I think the order can be made when neither of the litigating parties desires or asks for it.

Notwithstanding the doubt raised by the wording of r. 1, I think it need not be made by a judge in chambers on application by one of the parties, but that it may be made without summons or notice, and without the application or assent of any of the litigating parties. A judge sitting in Court has seisin of the cases in his list; he is just as much a judge of the High Court as if he were sitting in chambers, and it seems to me he has power under this rule, after giving the two parties an opportunity of saying what they desire to say on the question, to make an order for trial by a judge alone if the case is one within the provisions of r. 5. If the case is one within r. 5, it is not within r. 6. If an order has already been made under r. 6, it could only have been made on the ground that, in the opinion of the Court or a judge, the case was not within r. 5. In such a case the judge could not make an order under r. 5, as the question would then be chose jugée. If on the other hand an order be made under r. 5 before any application under r. 6, no order could be made under r. 6. The question in this case would also be chose jugée.

While appreciating the difficulties occasioned by the wording of the rules of Order XXXVI., I think the judge had power to make the order he did, and I agree that the appeal should be dismissed. I also agree with the order which Scrutton L.J. has stated with regard to costs.

Slesser L.J. I agree. On February 3, 1931, this case was in the special jury list for the day, but was unlikely to be reached. In the presence of counsel on both sides, after considering the pleadings, Horridge J. made an order that the cause should be transferred from the special jury list to the non-jury list. It had come into the jury list (originally as a common jury case) through an order of the Master under Order xxxvi., r. 1, no application having been made, save one by the defendants to order a trial before a special instead of a common jury, which application was acceded to. It is common ground that the order so made by the learned judge was made in the absence of any application, summons or notice of either party, and that, had the order not been so made, the case would forthwith or within a reasonably short time have been heard by the learned judge and a special jury. As I have said, the appellant, who is the plaintiff, was present by counsel before the learned judge as was also counsel for the defendants, but the whole matter only took three minutes, and it is clear that counsel for the respondents, while not opposing the order, was ready to proceed with the case before the special jury for which he had asked, in the same way as was counsel for the appellant.

The action, as disclosed on the pleadings, is based upon allegations of breach of warranty on a hire-purchase contract for a motor lorry and of misrepresentation and fraud. The plaintiff pleads in substance that a particular motor lorry, which he intended to purchase from the defendants, had been orally represented to be thoroughly examined and reconditioned; that on this representation he signed an agreement saying that he had examined the lorry, but that he signed without reading or understanding the agreement and paid the defendants 270*l.* at their request and received from them a motor lorry in purported performance of the contract. He further alleges that the representations were false, that the defendants had not reconditioned the motor lorry and that, on using it, it proved to be not in proper working order but was a bad, worn-out or useless lorry. He says that he then returned the lorry to the defendants, who, notwithstanding

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that he paid them in all 305*l.* 6*s.* 3*d.*, retain the said sum, claiming the same to be forfeited to them and also retain the lorry. In addition to these complaints, he alleges that their fraud was part of a system by which they induced persons of small means by false representations and advertisements to obtain the defendants' lorries as reconditioned lorries when in fact they were not so reconditioned. These allegations are denied by the defendants. I mention them only to show the class of case which was sought to be established by the pleadings which were before the learned judge when he made the order complained of. The appeal, which is against the order, raises questions of considerable importance for, in the admitted absence of any attempt by the parties expressly to dispense with the jury, questions of general application arise affecting the rights of judges to dispense with juries of their own motion on the eve of the trial.

The rule under which it is said by Mr. Birkett for the respondents that the action of the judge may here be justified is r. 5 of Order XXXVI. to the effect that: "The Court or a judge may direct the trial without a jury in any cause, matter or issue requiring any prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in their or his opinion conveniently be made with a jury." And the real issue in this case is whether, in the absence of any application under r. 1 to alter the order of the Master so as to transfer the case to the non-jury list (there being here no question of an application for a jury under r. 6, inasmuch as an order for a jury had already been made) the judge at the trial may direct the trial without a jury in accordance with r. 5. As to this rule, Lindley L.J. in *Jenkins* v. *Bushby* (1) points out that it "preserves the old practice of the common law Courts; there always was"—the Lord Justice must be dealing with the period since the Common Law Procedure Act, 1854—"power in such actions as are there mentioned to order a trial without a jury"—that is under s. 1 of the Common Law Procedure Act, 1854. Although s. 3 of the Common Law Procedure Act, 1854,

(1) [1891] 1 Ch. 484, 490.

requires the application of either party to a reference to arbitration in matters of account, the learned author of Day's Common Law Procedure Acts, points out at p. 205 of the third edition (1868), that "in practice some judges dispense with 'the concurrence of either party' . . . . and cases are constantly referred by judges at the trial under this section." He cites *Murray* v. *Sunderland Dock Co.* (1) It is to be observed that the present r. 5 does not in terms limit the period within which the Court or a judge may direct the trial without a jury nor does it in terms require that either party shall make application to the Court for such direction as did the Act of 1854.

It is also to be noted that there is contained in s. 89 of the Supreme Court of Judicature (Consolidation) Act, 1925, a provision as follows,—"In any cause or matter, other than a criminal proceeding by the Crown: (*a*) if all the parties interested who are not under disability consent; or (*b*) if the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot in the opinion of the Court or a judge conveniently be made before a jury or conducted by the Court through its other ordinary officers; or (*c*) if the question in dispute consists wholly or in part of matters of account; the Court or a judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator respectively agreed on by the parties, or before an official referee or officer of the Court." In that statute paras. (*b*) and (*c*) contemplate references being made by the Court without any application by a party interested at any time, and it is significant to contrast the language of s. 89 with that of s. 88, where the power of the Court to refer for inquiry or report is said to be subject to rules of Court and to any right to have particular cases tried by a jury. These two sections respectively reproduce in substance ss. 13 and 14 of the Arbitration Act, 1889, which, in their turn, re-enact ss. 56 and 57 of the Judicature Act, 1873. As to these latter Acts, in *Baroness Wenlock* v. *River Dee Co.* (2)

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(1) (1858) 1 F. & F. 179.

(2) (1887) 19 Q. B. D. 155, 158.

Lord Esher pointed out that a report under s. 57—the equivalent of s. 89 of the 1925 Act—" has the effect of the verdict of a jury." So that, where the matter is one of reference, there is no doubt that the judge, acting under s. 89 of the 1925 Act, may refer any matter which requires scientific investigation whether an order for a jury might have been obtained under Order XXXVI., r. 1, or not. The Court does not in general interfere with his discretion, although it may overrule the decision of the Court below " where serious injustice would result from that decision " : per James L.J. in *Golding* v. *Wharton Saltworks Co.* (1) cited in *Ormerod* v. *Todmorden Mill Co.* (2)

What the 1925 statute in s. 88 describes as " any right to have particular cases tried by a jury " may arise under Order XXXVI., r. 1, where a jury was originally ordered (as in the present case) and the parties elect not to make use of the latter limb of that rule (which enables a party when a jury has been ordered by summons or notice to have such direction altered, so that the case shall be transferred to the non-jury list) ; or, as of right, under Order XXXVI., r. 6.

As regards Order XXXVI., r. 1, which is the rule operating in this case, I cannot think that the mere existence of such a right to a jury in appropriate cases prevents a judge from exercising his discretion under Order XXXVI., r. 5. To hold otherwise would be to produce the result that whereas the judge might, under s. 89 of the Judicature Act, 1925, order a reference and so dispense with the jury in a case where the party would otherwise be entitled to it under Order XXXVI., r. 1 (as at one time in this case he suggested should be done), he would be unable under Order XXXVI., r. 5, to dispense with the jury and hear the case as a judge sitting alone. If the legislation and the rules had produced such an anomaly we should of course have to give expression to its intention, but I do not think upon a fair construction of Order XXXVI., r. 1, that any so absurd a result arises.

As regards r. 6, which does not here apply, the position is not quite the same, for the right to a jury is there in terms expressed to exist only in cases in which r. 5, and certain other rules, do not apply and, in so far as the Court or a judge acts under r. 6, he proleptically excludes r. 5. If the jury had in this case been ordered under r. 6 and not under r. 1, the case would thus have been different; for then the Court would have already decided, in considering the right to a jury under r. 6, that r. 5 did not apply, and so after it had decided that the case fell under r. 6, the Court could not have varied its own decision.

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(1) (1876) 1 Q. B. D. 374, 375.

(2) 8 Q. B. D. 664.

Apart from this particular provision in the rules, the case of *Kodak* v. *Alpha Film Corporation* (1) is an authority for holding that where a rule gives to the Court or a judge a specific power to hear without a jury, the more general rule giving the right to a jury must be read subject to the particular provision. In that case the question arose whether, on a summons for leave to sign final judgment under Order XIV., r. 1, the Court or a judge might, as a condition of allowing the defendant to defend, order that the case should be tried by a judge without a jury. The defendant, in opposing this condition, argued that Order XXXVI., r. 6, gave a general right to a jury in appropriate cases which should override the general power to make conditions under Order XIV., r. 6. Greer L.J., speaking of Order XIV., r. 6, says (2): "I cannot read the rule otherwise than as establishing an exception to the general rules as to mode of trial contained in Order XXXVI." Agreeing with Greer L.J. I said (3): "It is true that Order XXXVI., r. 6, in general terms does confer a right to a jury in appropriate cases, of which this is one, but a general right may be limited by particular restrictions and it is impossible in my view to read the words in Order XIV., r. 6, otherwise than as empowering the judge to give leave to defend, subject to such terms as to mode of trial as he may think fit without qualification." In *Ford* v. *Blurton* (4) Bankes L.J. pointed out how the right of either party to a jury was preserved by rules scheduled both to the Judicature Act, 1873, and to the Judicature Act, 1875, and, as I had

(1) [1930] 2 K. B. 340.
(2) [1930] 2 K. B. 355.
(3) [1930] 2 K. B. 359.
(4) 38 Times L. R. 801.

further occasion to indicate in *Kodak* v. *Alpha Film Corporation* (1) (there being now no inherent common law right to a jury), "if . . . . there is no such inherent right, the question resolves itself into the effect of two rules both made by authority of statute, the one conferring on the litigant the right to a jury, the other depriving him of that right under specified conditions."

It may have been unfortunate that the discretion of the judge should have been exercised in this case at a time when the cause was actually in the list for hearing, and such a discretion is subject to appeal: *Ormerod's* case (2); but here the learned judge had given warning on the day before that he was about to consider the matter and had both counsel before him and heard them before he made his order. In my view, there is ample material in the statement of claim to justify his conclusion that the case, notwithstanding the allegation of fraud and misrepresentation, will require scientific investigation. "The discretion . . . . is a discretion which ought to be exercised with great care," but where that discretion has been exercised "appeals . . . . ought not to be brought except in clear cases": per Bowen L.J. in *Gardner* v. *Jay*. (3) In *Mangan* v. *Metropolitan Electric Supply Co.* (4) where North J. had made an order for a jury after considering the circumstances of the case, this Court declined to interfere; and a jury has often been refused in appropriate actions, although they involve, among other things, charges of fraud: see *Moss* v. *Bradburn* (5); *Swindell* v. *Birmingham Syndicate* (6); *Ruston* v. *Tobin* (7); *Thornton* v. *Union Discount Co. of London*. (8)

In my opinion, therefore, in this case the learned judge has exercised a discretion vested in him under Order XXXVI., r. 5, which we should not disturb. This appeal must be dismissed.

Appeal dismissed.

Solicitor for appellant: *Sydney A. Musson.*

Solicitors for respondents: *Engall & Crane.*

(1) [1930] 2 K. B. 362.
(2) 8 Q. B. D. 664.
(3) (1885) 29 Ch. D. 50, 57.
(4) [1891] 2 Ch. 551.
(5) (1884) 32 W. R. 368.
(6) (1876) 3 Ch. D. 127.
(7) (1879) 10 Ch. D. 558.
(8) (1891) 7 Times L. R. 322.

W. H. G.

1931
Feb. 3.

THE KING *v.* JUDGE.

Ex parte JUSTICES OF THE ISLE OF ELY.

Contempt of Court—Attachment—Disobedience to Process—Inferior Courts—Quarter Sessions—Subpœna—Remedy for Disobedience.

The King's Bench Division has no power to attach for contempt a witness who has disobeyed a subpœna from quarter sessions. A clear distinction still exists between contempt which consists in interfering with the administration of justice by acts done or writings published, and contempt which consists in interfering with an order or other process of the inferior Courts.

Rex v. *Brownell* (1834) 1 Ad. & E. 598 followed.

Rule for a writ of attachment for contempt of Court.

On July 12, 1930, one Marjorie Sanders, a single woman residing at Murrow in the Isle of Ely, applied to a justice acting for the petty sessional division of Wisbech in the Isle of Ely for an affiliation summons against one Monkton of Whaplode Grove in the county of Lincoln. On July 19, 1930, the summons was heard at Wisbech Petty Sessions and was dismissed. From this decision Marjorie Sanders appealed to quarter sessions for the Isle of Ely. On October 7, 1930, a subpœna under the hand and seal of the justices at quarter sessions was issued by the clerk of the peace and served upon William Judge, of Whaplode in the county of Lincoln, by the appellant's solicitors, requiring his attendance as a witness at the hearing of the appeal. Judge's attendance was required for the purpose of corroborating Marjorie Sanders' evidence in a material particular. On October 8, 1930, on the hearing of this appeal at quarter sessions Judge's name was called in Court, but he failed to appear. The appeal was dismissed on the ground of want of corroboration of Marjorie Sanders' evidence. At the conclusion of the case the solicitor who had served the subpœna proved the service upon Judge and the tender of the conduct money. The Court of quarter sessions, feeling a difficulty as to the correct procedure to be adopted in the circumstances, resolved that the clerk of the peace take such steps as were necessary to bring Judge to account for his contempt in disobeying the subpœna. Judge in his affidavit tendered an apology to the Court and disclaimed any feeling of disrespect. He stated that he was unable to give evidence material to the case and that he failed to attend through a belief that a mistake had been made in serving him with a subpœna.

On December 5, 1930, a rule was obtained on behalf of the justices of Ely quarter sessions, and an order nisi made directing Judge to show cause why a writ of attachment should not issue against him for contempt of the Court of general quarter sessions for the Isle of Ely by his refusal or neglect to obey the writ of subpœna.

R. J. Sutcliffe for Judge, showed cause. In cases of contempt the writ of attachment will only be issued from this Court where the contempt is in the nature of interference with a fair trial and not in connection with procedure. Disobedience to a subpœna from quarter sessions is not manifest contempt of the authority of the Court of King's Bench, though neglect of Crown Office subpœna is. This Court has no jurisdiction to issue attachment unless the writ of subpœna has been issued by the Crown Office, to which application should be made where the witness whose attendance is required lives beyond the limits of the county: Pritchard's Quarter Sessions Practice, 2nd ed., p. 118. No case is to be found in the reports in which contempt of this kind towards an inferior court has been punished by attachment. *Rex* v. *Brownell* (1) is still good authority for the proposition that, where the subpœna is issued from quarter sessions and not from the Crown Office, this Court will not attach for contempt. Quarter sessions has its own powers for enforcing attendance—namely, by fine or recompense to the person aggrieved. An alternative remedy is by indictment or by an action for damages against a witness whose attendance was material and who has failed to obey the subpœna: Halsbury's Laws of England, vol. xiii., "Evidence," para. 799; *Rex* v. *Ring.* (2)

(1) (1834) 1 Ad. & E. 598.

(2) (1800) 8 T. R. 585.

The statute 45 Geo. 3, c. 92, s. 3, enacted that a subpœna issued in one part of the United Kingdom should be effectual in another part. This rendered a party disobeying the subpœna liable to attachment, but it did not extend the existing jurisdiction of quarter sessions as regards the validity and effect of the subpœna. In *Rex* v. *Parke* (1) it was held that the King's Bench Division has jurisdiction to commit a publisher for contempt in publishing matter tending to interfere with the fair trial of a charge of forgery at petty sessions, and this was followed in *Rex* v. *Davies.* (2) But here the contempt alleged is interference with the process of the Court and not with the fair trial of the case at quarter sessions. The only parallel case is *Rex* v. *Brownell* (3) and the doctrine laid down in that case, as already submitted, is still applicable.

Bosanquet K.C. and *Linton Thorp* for the Justices, in support of the rule. Legal contempt consists in an offence against the Sovereign as the fountain head of law and justice: Oswald on Contempt, 3rd ed., p. 1. A subpœna from quarter sessions is issued under the seal of the custos rotulorum for the county in the name of the Sovereign. There is no power to distrain for a penalty imposed by quarter sessions: *Rex* v. *Burchett.* (4)

Writ of attachment therefore is the proper remedy for contempt of an inferior court, and the only remedy which can be effectively employed. The proceedings here are in the nature of criminal proceedings and the Court of King's Bench has always had general power to attach for any conduct by which the course of justice is impeded, quite apart from remedies by fine or indictment. It is true that according to the older view this Court could not formerly grant attachment for disobedience to a subpœna issued out of quarter sessions: *Rex* v. *Room.* (5) It was customary in most cases to make the order of the inferior court an order of this Court and then commit for breach of the order, when occasion arose. This practice, however, did not apply in cases of contempt to writ of subpœna. Whatever other remedy may exist, this Court has always had an overriding power to order attachment, which is not now confined within the limits laid down in *Rex* v. *Brownell.* (1) Since *Rex* v. *Davies* (2) it is submitted that this Court has clearly had power to attach for any interference with the course of justice in the inferior courts. In *Rex* v. *Editor of the Daily Mail* (3) it was held that the King's Bench Division has inherent power to punish a person guilty of contempt of a court martial. Thus in spite of special powers given to the president of a court martial under the Army Act the power of this Court to attach for contempt still exists.

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(1) (1903) 2 K. B. 432.

(2) [1906] 1 K. B. 32.

(3) 1 Ad. & E. 598, 603.

(4) (1722) 1 Str. 567.

(5) (1834) 2 N. & M. (M.C.) 368.

LORD HEWART C.J. This case raises the interesting question whether the doctrine laid down in *Rex* v. *Brownell* (1) is still good law. In spite of the able argument of Mr. Bosanquet I think that it is. The judgments of Lord Denman C.J. and Littledale J. are free from ambiguity, while Taunton J. put the matter briefly in the words: "Disobedience to a Crown office subpœna is a manifest contempt of the authority of this Court; disobedience to a subpœna from quarter sessions is not. I am of opinion that we cannot interfere." A clear distinction is there recognized between contempt which consists in interfering with the administration of justice by acts done or writings published and contempt which consists in interfering with an order or other process of the inferior courts.

It may be difficult to find a clear and logical differentia between the two, but the difference has long been recognized in the Courts and I am not satisfied that we ought at this time to disturb it. Much has happened since 1834, but no case has been cited to show that *Rex* v. *Brownell* (1) is no longer law. On the contrary, from the elaborate judgment of Wills J. in *Rex* v. *Davies* (4) it appears that the distinction is still recognized between "the mere interference with the process of the magistrate's Court," and the "grave danger to the public of prejudicing the fair trial of a case to be heard in an inferior Court." It was said that if the remedy of writ of an attachment did not exist, there would be no power to enforce the authority of the inferior court in case of disobedience to the subpœna; but the writ of attachment can only be issued after the default in the same way as indictment or fine. From *Rex* v. *Clement* (1) it appears that quarter sessions and other inferior courts have power to fine or imprison for non-appearance or for non-attendance. Alternatively, a witness may be tried for his failure to attend after subpœna upon indictment. Finally, if the subpœna be issued from the Crown Office this difficulty does not arise. For these reasons, as regards the jurisdiction of this Court where the subpœna is issued from quarter sessions, I am not satisfied that lapse of time has introduced a change or that the doctrine in *Rex* v. *Brownell* (2) has been superseded.

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(1) 1 Ad. & E. 598, 603.

(2) [1906] 1 K. B. 32.

(3) [1921] 2 K. B. 733.

(4) [1906] 1 K. B. 32, 45.

AVORY J. I agree. The judgment of the Court delivered by Wills J. in *Rex* v. *Davies* (3) contains nothing inconsistent with the principle laid down in *Rex* v. *Brownell.* (2) On the contrary, the passage in his judgment already cited by the Lord Chief Justice seems to recognize the distinction between interference with the process of the magistrate's court, and the grave danger to the public of prejudicing the fair trial of a case. It is true that that observation was made upon the consideration of *Rex* v. *Burchett* (4), which was decided by Eyre J. sitting alone, but the decision was in accordance with the practice prevalent at the time, and I agree that it cannot be said that we are depriving the injured party of a remedy. Four different remedies are still open: Firstly, the subpœna can be applied for and issued from the Crown Office instead of from quarter sessions. Secondly, application may be made to quarter sessions, and I do not doubt that Holroyd J. in *Rex* v. *Clement* (1) had authority for saying that inferior courts could fine or imprison for contempt;

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(1) (1821) 4 B. & Ald. 218.

(2) 1 Ad. & E. 598.

(3) [1906] 1 K. B. 32, 45.

(4) 1 Str. 567.

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those courts can without doubt fine jurors who fail to attend, and no greater difficulty can arise in the case of persons failing to attend under subpœna, an absent witness being in the same position as an absent juror. Thirdly, indictment or information may be brought. Fourthly, an action for damages is available if it can be shown that the party on whose behalf the subpœna was issued is damaged by the failure of the witness to attend. For these reasons, there being these adequate remedies, I see no justification for differing from the law as clearly laid down in *Rex* v. *Brownell.* (1)

MACNAGHTEN J. I am of the same opinion.

Rule discharged.

Solicitors for Judge: *Smiles & Co., for Mossop & Mossop, Holbeach, Lincolnshire.*

Solicitors for the justices: *Withers & Co., for Metcalfe, Copeman & Pettefar, Wisbech.*

(1) 1 Ad. & E. 598.

F. P. F.

1931
Jan. 22, 26.

WETHERALL (J. H.) AND COMPANY, LIMITED *v.* THE LONDON ASSURANCE.

[1930. J. No. 1603.]

Shipping—General Average—Loss to Shipowner—Detention of Ship after Termination of Voyage—Delay during repair of General Average Damage—Insurance of Shipowner against General Average—Liability of Insurer for Detention of Ship—York-Antwerp Rules, rr. C, X (d), XI., XVIII.—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 66.

Detention of a vessel after the completion of the voyage while repairs necessitated by a general average act are being effected is not in itself admissible in general average; and, consequently, under a policy of marine insurance indemnifying a shipowner against general average, the insurer is not liable to the insured in respect of such detention.

The Leitrim [1902] P. 256, judgment of Gorell Barnes J., followed and explained.

ACTION in the Commercial List tried by Rowlatt J. on an agreed statement of facts.

The plaintiffs, J. H. Wetherall & Co., Ld., were the owners of the steamer *Blacktoft*, and as such fully interested in a policy of marine insurance dated February 19, 1929, by which the defendants, the London Assurance, insured the plaintiffs for 820*l.* part of 14,000*l.* from February 20, 1929, to February 20, 1930, against the ordinary perils in respect of the steamer, which was valued in the policy at the last mentioned sum. The policy included as part of it clause 9 of the Institute Time Clauses, Hulls, which provides (inter alia) that where the contract of affreightment so provides the general average adjustment shall be according to the York-Antwerp Rules, 1890 or 1924.

In May, 1929, the steamer loaded a cargo of coal at Goole for carriage to Rouen under the following documents: (*a*) A time charter dated November 13, 1928, and made between the plaintiffs as owners and Fenwick (W. F.) & Co., Ld., as charterers; (*b*) a voyage charter dated May 23, 1929, and made between Fenwick (W. F.) & Co., Ld., as owners, and the Humber Coal Company, Ld., as charterers; and (*c*) a bill of lading dated May 28, 1929, in which the Humber Coal

Company, Ld., appeared as shippers, and which was duly signed by the master of the steamer. The time charter provided (clause 10): "In the event of loss of time caused by drydocking or other necessary measures to maintain the efficiency of the steamer . . . . damage to hull or other accident preventing the working of the steamer and lasting more than twenty-four consecutive hours, hire to cease from commencement of such loss of time until steamer is again in efficient state to resume service . . . ."; and (clause 23): "General average shall be settled according to York–Antwerp Rules. Hire money not to contribute to general average." Each of the other two documents provided that general average should be settled according to the York–Antwerp Rules, 1924.

The steamer left Goole at 10 a.m. on May 29, 1929, but a quarter of an hour later, in swerving to avoid a collision with another vessel, she took the ground on Goole Ness. To get her off her engines were worked ahead and astern, and the services of tugs were obtained, but she was not refloated until 12.45 p.m. on May 30, 1929. The steamer suffered particular average damage, which, together with certain other such damage suffered on June 11, 1929, amounted to 446*l.* 5*s.*, and general average damage which amounted to 432*l.* 5*s.* On being refloated the steamer proceeded to Rouen, where she discharged her cargo on June 4, 1929, and afterwards carried another cargo from London to Goole. The steamer then went into the Alexandra Dock, Hull, and was there under repair from 10.30 a.m. on June 11, 1929, to 8 p.m. on June 20, 1929, i.e., 9 days 9½ hours. The particular average repairs and general average repairs were carried out concurrently and completed simultaneously. Had the two sets of repairs been effected separately each would have occupied substantially the same time as was occupied in effecting both together. Both sets of repairs were equally necessary.

By reason of the detention the plaintiffs suffered a loss which they put at 145*l.* 18*s.* 7*d.*, made up of loss of time hire, or alternatively demurrage or loss of profit by detention of the steamer, less certain expenses saved. An average statement dated November 13, 1929, apportioned that loss between the general average damages and the particular average damages above referred to, attributing 71*l.* 16*s.* part thereof to the former damage, and 74*l.* 2*s.* 7*d.* the remainder thereof to the latter damage, and allowed in general average the former of these sums and certain commission and interest amounting in the whole to 74*l.* 14*s.* 8*d.*

If the sum of 74*l.* 14*s.* 8*d.* was correctly allowed in general average, and the plaintiffs were entitled to be indemnified by the defendants under the policy in respect thereof as for a general average sacrifice, the defendants' proportion was 4*l.* 7*s.* 6*d.* If the sum of 74*l.* 14*s.* 8*d.* was correctly allowed in general average, and the plaintiffs were entitled to be indemnified by the defendants under the policy in respect thereof as for a general average expenditure, the defendants' proportion was 3*l.* 19*s.*

The plaintiffs claimed to recover from the defendants one or other of these proportions alternatively.

Miller K.C. and *H. U. Willink* (*W. L. McNair* with them) for the plaintiffs. During the detention of the steamer while the repairs were being carried out the plaintiffs suffered a loss of the hire, and they are entitled to be indemnified for that loss or damage under the policy of marine insurance either as for a general average sacrifice or a general average expenditure, the defendants' proportion being one or other of the sums alternatively claimed in the action. The two charterparties and the bill of lading all provide that general average shall be settled according to the York–Antwerp Rules, and the policy includes clause 9 of the Institute Time Clauses, Hulls, which asserts that where the contract of affreightment so provides the general average adjustment shall be according to these Rules. The Rules, however, make no provision for mere loss of time in doing repairs : see per Gorell Barnes J. in *The Leitrim.* (1) A claim for a loss of that kind should therefore be dealt with apart from the Rules

(1) [1902] P. 256, 268.

by the ordinary maritime law, and by that law it should be admitted as a general average loss. If the Rules are capable of applying to losses of this kind, then this particular loss by delay for the purpose of executing repairs after the termination of the voyage is a general average loss for which they provide. In this case the Rules ought to be interpreted according to the French practice, of which evidence has been given, and under them when so interpreted this is a general average loss. Even if the Rules be interpreted according to the English practice it is equally a general average loss. The damage or loss sustained by the plaintiffs in executing the repairs was a direct consequence of the general average act within the meaning of the earlier part of r. C, and should therefore be allowed as general average thereunder. The latter part of that rule no doubt provides that damage or loss sustained by the ship through delay on the voyage shall not be admitted as general average ; but it does not provide that damage or loss through delay after the voyage in repairing general average damage shall not be admitted. On the contrary it must be regarded as providing by implication that damage or loss of the latter description may be admitted. This is not an indirect loss from delay on the voyage such as demurrage, which is rendered inadmissible as general average by the latter part of that rule. The time spent in executing the repairs in question was a loss caused by or directly consequential on the general average act, and it was therefore a general average loss within the meaning of the Marine Insurance Act, 1906, s. 66, and recoverable as such. Where the owner of a vessel injured in a collision had entered into a contract for a subsequent voyage and the repairs due to the collision prevented fulfilment of the contract, it was held that he was entitled to claim as damages from the owner of the other vessel the loss of earnings under the contract, these damages not being too remote but flowing directly from the collision : *The Argentino.* (1) It is true that it was held in *The Leitrim* (2) that loss of time resulting from detention under repair of general average damage was not

(1) (1889) 14 App. Cas. 519.

(2) [1902] P. 256.

recoverable in general average. It would seem, however, that the decision in that case is limited to cases in which all the parties to the adventure suffer damage equally by the delay, and, therefore, that it is not applicable to the present case, in which the shipowners only suffered damage. Further, that case was decided before the passing of the Marine Insurance Act, 1906, and it would appear to be inconsistent with s. 66 of that Act. The fact that the particular average repairs and the general average repairs were carried out at the same time does not prevent the plaintiffs from claiming the time spent in executing the latter repairs as a general average loss. It does not appear that the two sets of repairs took exactly the same time. Even if they did, part of the time spent should be treated as general average damage. Where a vessel damaged in two collisions with two wrongdoing vessels respectively was put into dry dock to repair at the same time the damage by both collisions and the repairs of the second collision damage took the shorter time, it was nevertheless held that the owners of the second wrongdoing vessel were liable for a proportion of the drydocking expenses: *The Haversham Grange.* (1)

Le Quesne K.C. and *Sir R. Aske* for the defendants. The loss suffered by the plaintiffs by reason of the detention of the steamer while the repairs were being carried out after the termination of the voyage is not admissible in general average, and the defendants are not liable under the policy to indemnify the plaintiffs against it. The policy provides that the general average adjustment shall be made according to the York–Antwerp Rules, and it must be so made in any case to which these Rules apply. The Rules form a self-contained code binding on the parties who choose to adopt them, the earlier or lettered rules containing the general principles and the subsequent or figured rules containing specific cases which do not contradict the general rules: see per Roche J. in *Vlassopoulos* v. *British and Foreign Marine Insurance Co.* (2) In the present case the Rules must be interpreted according to the English and not according to

(1) [1905] P. 307.

(2) [1929] 1 K. B. 187, 197, 198.

the French practice. The average adjusters would seem to have admitted the plaintiffs' claim because they applied the French practice: if they had rightly adopted the English view of the Rules they must have rejected the claim. Rule C is decisive of the present case in favour of the defendants. The first part of the rule provides that only such damages or losses as are the direct consequence of the general average act shall be allowed in general average; and it therefore excludes the loss of time in question, which was not the direct but an indirect consequence of the general average act. The latter part of the rule, by excluding damage or loss through delay on the voyage, must be taken to exclude a fortiori damage from delay after the voyage, and by excluding demurrage, it clearly excludes loss of time after the voyage. Rule XI. provides that when a ship is detained for the purposes of repairs on her original voyage, wages during the period of detention shall be admitted in general average, but if she is detained after the completion of the voyage, wages during the period of detention shall not be admitted. That rule makes no mention of any allowance in respect of time lost for the purposes of repairs, and on the principle adopted in the rule time lost for these purposes after the voyage should not be admitted. Rule XVIII. provides that the amount to be allowed as general average for damage or loss to the ship when repaired or replaced shall be the actual reasonable cost of repairing or replacing that damage or loss; but no suggestion is there made of any allowance for loss of time while the repairing is in progress. Rule X (*d*) provides that the extra cost of doing certain specified things in order to save expense in repairing the ship may be allowed in general average, but nothing is there said as to any allowance in respect of the time spent in doing the repairs. Under these Rules the expenses admitted as general average are in almost every instance those of things done during the voyage, and in no instance is any allowance made for mere loss of time in executing repairs or otherwise after the completion of the voyage. If the framers of the Rules had intended that a claim for the profitable employment of the vessel after the voyage should be admitted, they would have expressed that intention in plain terms and would not have left it to be gathered by inference. In *The Leitrim* (1) it was held that loss of time-freight resulting from detention of the ship during the voyage under repair of general average damage was not allowable in general average, and it was there observed that a loss of that kind was not introduced into the York–Antwerp Rules. (1) The detention there was during the voyage, and the inference from the decision is that detention after the voyage would be even more emphatically disallowed. The York–Antwerp Rules in their present form are based upon the Marine Insurance Act, 1906, and that Act is adverse to the plaintiffs' claim. The loss of time here in question is not a general average loss within the meaning of s. 66, sub-s. 1, because it was not caused by or directly consequential on the general average act. Further, it is not a loss for which the defendants as insurers of the vessel are liable under s. 55, sub-s. 2 (*b*), because it is a loss proximately caused by delay. Apart from any consideration of general average, it would appear to be settled that under a policy of insurance on a ship the shipowner is not entitled to recover for loss incurred during the detention of the ship in consequence of the execution of repairs or other work rendered necessary by an insured peril: see *De Vaux* v. *Salvador* (2); *Field Steamship Co.* v. *Burr* (3); and *Shelbourne & Co.* v. *Law Investment and Insurance Corporation.* (4) The steamer suffered particular average damage before she suffered the general average damage, and the particular average repairs and the general average repairs were carried out together and occupied the same time. To make an allowance to the plaintiffs in respect of time spent on the general average repairs as well as in respect of time spent on the particular average repairs would consequently be not merely to indemnify them but to make them gainers by their general average sacrifice, a course which is not permissible: see per Montague Smith J. in *Fletcher* v. *Alexander.* (5) In the case of *The Haversham*

(1) [1902] P. 256, 268.
(2) (1836) 4 Ad. & E. 420.
(3) [1899] 1 Q. B. 579.
(4) [1898] 2 Q. B. 626.
(5) (1868) L. R. 3 C. P. 375.

Grange (1), which was cited on behalf of the plaintiffs, where a vessel damaged in two collisions with two wrongdoing vessels was put into dock to repair at the same time the damage by both collisions, and the repairs of the second collision took the shorter time, it was held that the owners of the second wrongdoing vessel were not liable for demurrage. The decision in that case on that point was approved in *Admiralty Commissioners* v. *S.S. Chekiang* (2) by Lord Phillimore, who there laid it down that if a vessel has gone into dry dock to repair previous damage her detention for repairs due to a subsequent collision with a wrongdoing vessel will not be a charge against the wrongdoer. (3) On that principle the loss of time here incurred should be attributed entirely to the particular average damage.

Miller K.C. in reply. None of the York–Antwerp Rules when rightly understood is opposed to the plaintiffs' claim. This is not a claim for loss through delay on the voyage, which r. C provides shall not be admitted as general average; but for loss through delay extending beyond the voyage which is not declared either in that rule or elsewhere to be inadmissible in general average. The latter part of r. XI., which provides that wages incurred after the abandonment of the voyage shall not be admitted, only applies where the original voyage has been abandoned; and the case which it contemplates has no analogy to this case, in which there was no abandonment of the voyage. Rule XVIII., which shows how to arrive at the amount to be allowed as general average for damage or loss to the ship, her machinery or gear, is necessary to guide the adjuster in assessing the amounts to be allowed in respect of these matters, but it does not by implication exclude other matters such as wages and delay. The reason why r. X (*d*) does not specify loss of time as one of the subjects of general average is that that is already provided for by the ordinary maritime law. The cases of marine insurance cited on behalf of the defendants do not apply. The plaintiffs are not here suing the defendants on an obligation to pay for a loss caused by an insured peril, but on an obligation to pay for a general average sacrifice incurred in order to avoid losses by insured perils. The delay in executing the repairs ought not to be attributed to the particular average damage only. It cannot be assumed that the particular average damage occurred entirely before the general average damage. It may be that the former damage did not occur as soon as the vessel grounded, but later while she still remained aground and after part of the general average damage had been incurred. The plaintiffs' claim cannot be a novel one, and the reason why similar claims have not hitherto received attention probably is that they have always been admitted.

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(1) [1905] P. 307, 316, 317.

(2) [1926] A. C. 637.

(3) [1926] A. C. 653.

Jan. 26. ROWLATT J. In this case the question is whether the plaintiff shipowners can recover against their underwriters in respect of delay to the ship while repairs necessitated by a general average act were being executed after the voyage had been completed. The facts are embodied in an agreed written statement upon which the case was argued. I need not here set them out again.

The first point in logical order—for if it succeeds it excludes all other points—taken for the defendants was that the ship was bound to suffer this delay for the purpose of repairs due to a particular average loss, incurred before the general average act, and that as the general average repairs were done in the same period there was no delay attributable to the general average act. In my view it is not clear that the facts were as suggested, and the statement of facts upon which my decision was invited was not drawn to bring out this point. It seems to me that some of the particular average damage involved in the casualty of stranding may have occurred after some at least of the general average damage happened. If so, the general average loss was not incurred by a vessel already doomed to this delay (if I may use that expression) in respect of a particular average loss, and the point fails.

Another point which was mooted was whether the York–Antwerp Rules were under clause 9 of the Institute Time Clauses to be interpreted according to the French or English practice. I intimated my opinion that the English practice is the relevant one. The contention that it is the French is open to the plaintiffs in another Court.

The question that remains may be stated thus: Mr. Miller, for the plaintiffs, contended that under the Marine Insurance Act, 1906, s. 66, and the York–Antwerp Rules as understood in this country, loss by delay for the purpose of executing such repairs as these was in principle recoverable subject to an exception laid down in *The Leitrim* (1) as regards delay during the voyage when other interests were suffering delay also.

Mr. Le Quesne, on the other hand, contended that all delay was outside the scope of a general average loss altogether. He supported his argument by a critical examination of r. C of the York–Antwerp Rules and by reference to rr. XI., XVIII. and X (*d*). He also urged that such cases as *Field Steamship Co.* v. *Burr* (2) and *Shelbourne & Co.* v. *Law Investment and Insurance Corporation* (3) show that delay is not for the present purpose a direct consequence of the general average act. In *Field Steamship Co.* v. *Burr* (2) it was held that the cost of discharging a cargo which had become putrid in consequence of delay resulting from a collision was not recoverable by the shipowner under a policy on hull and machinery. In *Shelbourne & Co.* v. *Law Investment and Insurance Corporation* (3) a barge owner failed to recover from his underwriters in respect of delay in doing repairs necessitated by a collision. The policy in the present case said Mr. Le Quesne, is on hull and machinery, and consequently here, too, loss consequential on the actual damage, but outside the cost of repair, cannot be recovered. In the view I take it is not necessary, and therefore not advisable, to discuss the relevance of such cases to claims for a general average loss, a conception derived primarily from the contract of affreightment.

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(1) [1902] P. 256.

(2) [1899] 1 Q. B. 579.

(3) [1898] 2 Q. B. 626.

In my view the defendants here are entitled to succeed in this Court upon the direct authority of the judgment of Gorell Barnes J. in *The Leitrim.* (1) The material passage is as follows: "But it does not at all follow that the mere loss of the profitable employment of the vessel as distinguished from actual expenses should in such a case be allowed. In the first place, so far as I can ascertain, a loss of this character has never been claimed in general average. It is not introduced in the York–Antwerp Rules, nor can I find any trace of it being allowed by the laws of any foreign country, though many of them contain provisions as to the allowance in general average of the wages and maintenance of the crew. It may be said, why on principle should not the loss of time be compensated for where that loss is due to the necessity for repairing damage, itself the subject of general average? I think the answer is that although possibly there may be cases in which the loss of time is not common to all concerned, at any rate in cases like the present the loss of time is common to all the parties interested, and all suffer damage by the delay, so that the damages by loss of time may be considered proportionate to the interests, and may be left out of consideration." (2) It seems to me that when the learned judge speaks of a "loss of this character" as being hitherto unknown and not introduced by the York–Antwerp Rules he is speaking of all delay, and when, in pointing out that all interests are involved in the delay and that it is impracticable to work out all the claims, he allows that possibly there may be cases where the delay does not affect them all. He does not mean that in these cases there would exceptionally be a different rule, but is indicating that the possibility of such cases does not affect the practical principle.

I have not forgotten that the Marine Insurance Act, 1906, was passed after the decision in *The Leitrim* (1), but I cannot read the language of s. 66 as inconsistent with it. Nor do

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(1) [1902] P. 256.

(2) [1902] P. 268, 269.

I forget that r. C of the York–Antwerp Rules, 1924, negatives only a claim for delay during the voyage. But I cannot accept the view that this rule by the omission expressly to exclude, impliedly admits delay after the voyage. From one point of view, as Mr. Le Quesne said, one would think it was excluded a fortiori, or to put it in another way, a claim in that respect may not have been contemplated as calling for mention.

In the result there must be judgment for the defendants with costs.

Judgment for defendants.

Solicitors for plaintiffs: *Botterell & Roche, for Botterell, Roche & Temperley, Newcastle-upon-Tyne.*

Solicitors for defendants: *Waltons & Co.*

J. R.

NETHAWAY *v.* BREWER.

1931
March 31.

Animals—Conveyance—Vehicle—Duty to cleanse and disinfect after User—Exception—"Consecutive journeys" between two Points—Whether consecutive Journeys either Way or both Ways—Transit of Animals (Amendment) Order, 1930, *dated August* 30, 1930, *St. R. & O.*, 1930, *No.* 702.

The Transit of Animals (Amendment) Order, 1930, art. 1, enacts, among other things, that any road vehicle used for the conveyance of animals the property of a dealer or in connection with the trade or business of a dealer shall, as soon as practicable after each occasion on which it is so used, and before any other animal is placed in it, be cleansed and disinfected as therein mentioned, "Provided that in the case of a vehicle . . . . making consecutive journeys on any one day between the same two points, the requisites of this article shall be deemed to be sufficiently complied with if the vehicle is cleansed and disinfected . . . . as soon as practicable after the completion of the last of such consecutive journeys":—

Held, on the construction of the Order, that the expression "consecutive journeys . . . . between the same two points" in the proviso to art. 1 does not mean consecutive journeys in the same direction between the two points (the return journey counting as distinct), but consecutive journeys in either direction, and that the vehicle need not be cleansed and disinfected until the completion of the last of its consecutive journeys in either direction.

CASE stated by justices for the county of Devon.

On January 10, 1931, the justices sitting at Torrington, in the county of Devon, heard an information which was preferred by the now respondent, Percy J. Brewer, a sergeant of police, under the Orders of the Board of Agriculture and Fisheries made under the Diseases of Animals Acts, 1874–1927, against the now appellant, John R. Nethaway, of "Kildale," Orchard Hill, Bideford, for that he on December 8, 1930, at Stibb Cross, in that county, did unlawfully, after using a motor-van for the carriage of animals, fail to cleanse and disinfect the same before placing other animals therein contrary to the Transit of Animals (Amendment) Order, 1930, art. 1. (1)

At the hearing of the information the following facts were proved or admitted:—

The appellant was a cattle dealer. On the morning of April 8, 1930, the appellant took from his premises, "Kildale," to Stibb Cross in his motor-van, used exclusively for the conveyance of animals in connection with his trade or business of a cattle dealer, twelve lambs. At Stibb Cross, after removing these lambs from the motor-van, and before moving, cleansing or disinfecting the motor-van, the appellant on the same morning placed therein a calf to be taken to his premises at "Kildale." On being spoken to by a police constable he removed the calf and cleansed and disinfected the motor-van, and later the same day replaced the calf in the van and took it to his premises, "Kildale."

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(1) The Transit of Animals (Amendment) Order, 1930, provides:—

Art. 1: "(1.) Subject as herein provided, any road vehicle which is used on a highway, road or lane by any person . . . .

(b) for the conveyance of animals the property of a dealer or in connection with the trade or business of a dealer; . . . .

shall, as soon as practicable after each occasion on which it is so used and before any other animal or any fodder or litter, or any other thing intended to be used for or about animals, is placed in it, be cleansed and disinfected by and at the expense of the owner thereof or the person in charge of the same, in the following manner: . . . .

Provided that in the case of a vehicle, used exclusively for the aforesaid purposes or any of them, making consecutive journeys on any one day between the same two points, the requisites of this article shall be deemed to be sufficiently complied with if the vehicle is cleansed and disinfected in the aforesaid manner as soon as practicable after the completion of the last of such consecutive journeys."

"(6.) Where any vehicle or thing required by this Order to be cleansed and disinfected is at a market, fair ground or sale yard at which a local authority is ready and willing to carry out the cleansing and disinfection or at which the local authority provides or causes to be provided such facilities as aforesaid, it shall be cleansed and disinfected before it is removed from such market, fair ground or sale yard, except in any case to which the proviso to paragraph (1.) of this article applies."

On the part of the appellant it was contended that the appellant had committed no offence against the Order of 1930 or against art. 1 thereof in view of the proviso to that article; that the appellant's journeys with the van had been and were consecutive journeys between the same two points—namely, Stibb Cross and "Kildale," and that it was not necessary for him under the article to cleanse and disinfect his motor-van until after the completion of the last of these consecutive journeys, that was to say, after arrival at "Kildale," and that no offence against the Order had been committed by placing the calf in the motor-van for conveyance to "Kildale" before cleansing and disinfecting the van.

The respondent contended that the appellant had committed an offence within art. 1 of the Order.

The justices were of opinion that, as the object of the Order was the prevention of the carrying and dissemination of disease, the introduction into the van of another animal from a point other than the starting-point before the cleansing of the van was an offence against the Order; and, further, that the words in the proviso "consecutive journeys on any one day between the same two points" meant going more than once each way, and were intended to apply only to the conveyance in relays of animals from one point to another and without the introduction of another animal from any point other than the starting-point; and they therefore held that the appellant was guilty of an offence against the Order and ordered him to pay a fine of 3*l.*

The question for the Court was whether the justices came to a correct determination and decision in point of law.

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W. Blake Odgers for the appellant. The justices were wrong in holding that the appellant had committed an offence against the Transit of Animals (Amendment) Order, 1930, art. 1. The substantive part of para. 1 of that article provides that any road vehicle used for the conveyance of animals in connection with the trade of a dealer shall, as soon as practicable after each occasion on which it is used and before any other animal is placed in it, be cleansed and disinfected; and if there was no qualification of that provision the appellant would no doubt have been bound to cleanse and disinfect his vehicle at Stibb Cross before placing the calf in it. But the proviso to that paragraph says that in the case of a vehicle used exclusively for the aforesaid purpose making "consecutive journeys . . . . between the same two points" the Act shall be deemed to be complied with if the vehicle is cleansed and disinfected as soon as practicable after the completion of the last of such consecutive journeys. On the true construction of the proviso the expression "consecutive journeys" means successive journeys whether in the one direction or in the other. The justices were mistaken in thinking that that expression meant going more than once each way. They substituted for it the expression "consecutive journeys in the same direction" and thus read into the proviso words which are not there. When the appellant's van arrived at Stibb Cross on the occasion in question, it was making consecutive journeys between the same two points—namely, between that place and his own premises, and as it was about to return to his premises it was not completing the last of these journeys. Consequently, the appellant was not bound by para. 1 to cleanse and disinfect the van at Stibb Cross. Similar considerations apply if regard be had to para. 6 of the article. That paragraph provides that where the vehicle is at a market, fair ground or sale yard at which the local authority is ready and willing to cleanse and disinfect the vehicle, it shall be cleansed and disinfected before removal therefrom; and if that paragraph had ended there it may be that the appellant would have been bound by it to have his vehicle cleansed and disinfected at Stibb Cross.

But that paragraph goes on to except any case to which the proviso to para. 1 applies, and therefore, according to the construction already put upon the proviso, the appellant was not obliged under para. 6 to have his vehicle cleansed and disinfected at Stibb Cross. The justices were led to adopt the construction which they put upon the provisions by their desire to prevent the dissemination of disease among animals. But even if that construction were adopted it would not necessarily secure the object of the justices, because after the vehicle had been cleansed and disinfected at the market, the owner might place in it other animals on his return journey home. The article is a penal provision, and should be construed in favour of the owner of the vehicle.

No counsel appeared for the respondent.

AVORY J. I think that the argument on behalf of the appellant ought to prevail.

The appellant's motor-van had been used in taking twelve lambs from his premises at Bideford to market at Stibb Cross where, after removing the lambs from the van and before cleansing or disinfecting it, he placed in it a calf to be taken back to his premises. It was alleged that in so doing he acted contrary to the Transit of Animals (Amendment) Order, 1930, art. 1.

Para. 1 of that article provides, among other things, that any road vehicle used for the conveyance of animals in connection with the trade or business of a dealer shall, after each occasion on which it is so used and before any other animal is placed in it, be cleansed and disinfected. It is admitted that what was done by the appellant here would be an offence under that paragraph unless the case comes within the proviso thereto, which says that in the case of a vehicle making consecutive journeys on any one day between the same two points the article shall be deemed to be complied with if the vehicle is cleansed and disinfected as soon as practicable after the completion of the last of such consecutive journeys.

The question turns upon the meaning of the expression "consecutive journeys . . . . between the same two points" in the proviso to para. 1. The justices would seem to have taken the view that the expression means journeys which include both a return home and a fresh excursion to the farther point. It is possible that that view might be taken but for para. 6 of the article. That paragraph provides that where the vehicle is at a market, fair ground or sale yard at which a local authority is ready and willing to cleanse and disinfect it or has provided facilities to do so, it shall be cleansed and disinfected before it is removed therefrom, except in any case to which the proviso to para. 1 applies. In other words, if the vehicle has arrived at a market, fair ground or sale yard of that description it shall be cleansed and disinfected before removal therefrom, except in any case in which it is making consecutive journeys between the same two points, when it will be sufficient if the vehicle is cleansed and disinfected on the completion of the last consecutive journey. Thus, the vehicle need not be cleansed and disinfected at the market when it is making consecutive journeys between the same two points, provided it is cleansed and disinfected on the completion of the last of these journeys. The paragraph shows that the expression "consecutive journeys" in the proviso does not mean consecutive journeys both ways, but consecutive journeys either way. Where, as here, the vehicle is about to make a final return journey home from the market, there is no occasion to cleanse and disinfect it under art. 1 before the completion of that return journey.

In my opinion the appeal should be allowed.

Swift J. I agree.

Finlay J. I also agree.

Appeal allowed.

Solicitor for appellant: *T. Oerton, jun., Bideford.*

J. R.

KEREN KAYEMETH LE JISROEL, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

C. A.
1931
May 1, 4, 21.

Revenue—Income Tax—Association for settling Jews in Palestine and Elsewhere—Charity—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 37.

An Association incorporated as a company limited by guarantee had as its main object, as stated in its Memorandum of Association, " to purchase, take on lease or to exchange or otherwise acquire any land, forests, rights of possession and other rights, easements and other immovable property in . . . . Palestine, Syria, or other parts of Turkey in Asia and the Peninsula of Sinai for the purpose of settling Jews on such lands." Then follow in the Memorandum twenty-one specified objects and powers which included power to cultivate and improve any lands and erect buildings thereon, to let any land of the company to any Jews, to acquire, construct and manage tramways, railways, harbours, docks, hydraulic works, telegraphs, telephones, factories and workshops, and to purchase and sell, work and develop mines and mining rights, and to carry on the business of mining and metallurgy. All the twenty-one objects or powers were stated to be subject to a proviso that they were to be " exercised only in such a way as shall in the opinion of the Association be conducive to the attainment of the said primary object." No part of the income of the Association was distributable by way of dividend, bonus or otherwise by way of profit to the members of the Association, nor, in the event of a winding up, were the surplus assets distributable among them :—

Held (affirming Rowlatt J.), that the Association was not " a body of persons . . . . established for charitable purposes only " within s. 37, sub-s. 1 (*b*), of the Income Tax Act, 1918, so as to be entitled to exemption from income tax in respect of consolidated stock owned by it and representing donations. The Association had widely philanthropic objects, but it fell within none of the four principal divisions into which charity was divided by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* [1891] A. C. 531, 583.

Appeal from a decision of Rowlatt J. on a case stated under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts.

1. At a meeting of these Commissioners held on July 10, 1929, Keren Kayemeth Le Jisroel, Ld. (hereinafter called " the Association "), appealed against the refusal of the Commissioners of Inland Revenue to grant exemption from Income Tax under s. 37 of the Income Tax Act, 1918, on the interest of 32,000*l.* consolidated stock owned by the

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Association and representing donations, the Commissioners being of opinion that the Association was not a charity within the meaning of that section.

2. The Association was a company limited by guarantee forming part of the Zionist organization, the objects of which were the restoration of Jews to and their settlement upon the Holy Land. The primary object and function of the Association was the acquisition in perpetuity of land in the Holy Land as the inalienable property of the Jewish people for the purpose of settling Jews on such land.

No part of the income or property of the Association was payable or transferable directly or indirectly by way of dividend, bonus or otherwise by way of profit to the members of the Association, nor, in the event of the winding up of the Association, were the surplus assets distributable among them.

3. In addition to the acquisition and letting of land to Jews, the Association had, under its ancillary powers, installed a water supply on much of such land, planted forests, cultivated plantations, and in a few cases in urban districts had erected homesteads for workers, and had, in carrying out such operations and otherwise, trained and found employment for agricultural and other workers. The Association had also granted land for and advanced money in connection with the erection of synagogues, orphanages, hospitals, social clubs for homeless workers, technical, art and other schools, instructional farms, the Hebrew University, a Jewish national museum, and other religious, charitable and educational institutions.

The settlers to whom land had been let by the Association and for whose benefit the funds of the Association had otherwise been employed, had been destitute Jewish refugees from Eastern Europe and elsewhere, consisting largely of fugitives from religious persecution and the homeless dependants of victims of massacres, and other impecunious Jewish settlers who could not without such assistance have followed their agricultural or other occupations in the Holy Land. The funds of the Association had been collected by subscriptions, donations and bequests on the understanding that they would be so employed, and in many cases donations and bequests to the Association had been allocated by the donors themselves to a specific object.

The Association had been recognized by the Government of Palestine as a public benefit undertaking.

4. The Association did not receive any rent for the lands acquired by it, except in the case of a small number of settlers who originally came to Palestine without means, and, having gained experience on the Association's farms and otherwise, had been enabled to earn a livelihood. In 1927 the total rentals so received by the Association amounted to 1433*l.*, or about 0.1 per cent. of the capital value of the land acquired by the Association. In no instance did the rent charged exceed 2 per cent. of the capital value of the land.

5. The annual general meetings of the Association were held in different countries. It was last held in England in 1920. The head office was in Jerusalem, and the funds were banked partly in England and partly in Palestine. The Association's common seal and its books were kept in Palestine. The registered office was in England, and there was an administrative officer and a secretary permanently in England. The effect of the Association's Memorandum of Association sufficiently appears in the judgments.

6. Dr. Asher Feldman, ecclesiastical assessor to the Chief Rabbi, stated in evidence that in his view the objects of the Association were religious, and that it was part of the religious duty of every Jew to assist the repatriation of the Jews in the Holy Land. His view was based on Leviticus, chapter xxv., verses 23 and 24, and on a continuous line of authorities extending from Biblical times to the present day, including the oral or Rabbinic law, such as the Talmud and other books of authority, and he stated that it represented the universal religious sentiment of Jews throughout the ages and at the present day, forming part of their daily prayers.

7. On behalf of the Association it was contended that: (1.) It being a part of the Jewish religion to acquire and hold land in Palestine, for the Jewish people assisting in such

work was a religious act, and the furtherance of that object was correctly described as the advancement of religion. (2.) The funds of the Association having been subscribed or given on the understanding that they would be devoted for the benefit of impecunious Jewish settlers, the Jewish settlers for whose benefit those funds were employed being, in fact, all poor people, the objects and activities of the Association were for the relief of poverty. (3.) The purposes of the Association were purposes beneficial to the community. (4.) For some or all of the above reasons, and in view of the facts stated, the Association was a body established for charitable purposes only, and the interest formed part of its income, and was applied to charitable purposes only. (5.) Alternatively, for such reasons, and in view of such facts, the interest, according to the rules established by the Memorandum of Association, was applicable to charitable purposes only, and was in fact so applied.

8. On behalf of the respondents it was contended that: (1.) The main object of the Association was the repatriation of the Jews in the Holy Land without regard to the means of the immigrants. (2.) The objects did not necessarily include the alleviation of poverty among the Jews or the relief of the destitute. (3.) The promotion of the objects was not a religious duty of members of the Jewish faith nor for the advancement of religion. (4.) The object of the Association was not a purpose beneficial to the community in the charitable sense. (5.) It had not been proved that the Association was established either for the advancement of religion, the relief of poverty, or a purpose beneficial to the community. (6.) The Association was not a body to which s. 37, sub-s. 1 (*b*), of the Income Tax Act, 1918, applied, as it was controlled and resident abroad, and its activities were carried on abroad. (7.) It had been proved that the dividends from the consols did not form part of the income of any body of persons or trust established for charitable purposes only, and had not been applied to charitable purposes only.

The Commissioners held that the Association was not a charity, and that its funds were not applicable to nor applied to charitable purposes only. They therefore refused the claim.

On appeal Rowlatt J. said that the object of the Association was to populate Palestine and the surrounding country over a large area with Jews. The object was not to found a dwelling-place for Jews dissatisfied with their dwelling-place, but that Palestine should be populated by Jews, and the dominant motion was towards the land and not towards the people. If the Jews in various countries were well treated and free from persecution or poverty, the desire to populate Palestine with Jews would still remain. In these circumstances the Association took very wide powers. It was clear that the rules of the Association eliminated the idea of private profit, and that the object of the Association was not a political one in the sense that it desired to create a Jewish State. It was said that the Association must be regarded as a charity either because it was for the promotion of religion or the relief of poverty, or that it came within the fourth head referred to in Lord Macnaghten's judgment in *Commissioners for Special Purposes of Income Tax* v. *Pemsel.* (1) On the first ground it is said that the restoration of the land in Palestine to Jewish occupation is a religious object among the Jews. That argument could not prevail. The promotion of religion meant the promotion of the spiritual teaching of the religious body concerned and the maintenance of the spirit of its doctrines and observances. If a religion imposed the pursuit of some ulterior secular aim that did not make it the promotion of religion. Nor could it be said that the Association had as its object the relief of poverty. Its object was to settle Jews in Palestine, but the dominant purpose was not the amelioration of the position of the individual but the repopulation of the Holy Land with Jews. For the same reason it could not be said that the object of the Association was charitable under the further head already mentioned.

The Association appealed.

Sir John Simon K.C., *A. M. Latter K.C.*, *H. Infield* and *Dr. S. Daiches* for the appellant Association. Charity is

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(1) [1891] A. C. 531, 583.

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defined by Lord Macnaghten in *Pemsel's* case (1), and this Association comes within three of the four heads. It exists for the promotion of religious purposes. It also exists for the relief of the poor, and it exists for purposes beneficial to the Jews who are a class of the community.

To take the third ground on which the Association can be said to be for charitable purposes only under s. 37 of the Income Tax Act, 1918, the Association clearly has as its object the settlement of the Jews in Palestine. Such an object is charitable, as is shown by *Verge* v. *Somerville* (2), where it was decided that a fund bequeathed for the benefit of New South Wales returned soldiers was a valid charitable trust. From this point of view it is immaterial that the fund should not be for the benefit of the poor only: *Goodman* v. *Mayor of Saltash* (3) and *Verge* v. *Somerville.* (2) *Attorney-General* v. *National Provincial and Union Bank of England* (4), on which Rowlatt J. relied, has no bearing on the present case. The question there was whether a gift for such patriotic purposes or objects and such charitable institutions or objects as the trustees should select was a good gift. It was held that " and " must be given a disjunctive meaning, as if it was " or," and that patriotic purposes are not necessarily charitable. That case has no bearing. The Jews are sufficiently a unity to be regarded as a class of the community, so that a trust for their benefit can be a charitable trust: see *In re Christchurch Inclosure Act* (5) and *Mitford* v. *Reynolds.* (6)

In *In re Macduff* (7) Lindley L.J. quotes from the judgment of Lord Eldon in *Morice* v. *Bishop of Durham* (8) to show that a trust must be such that its execution can be under the control of the Court, and it is there held that a trust for charitable and philanthropic purposes is too wide. There are however philanthropic purposes which are also charitable, and that is so in the present case.

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(1) [1891] A. C. 531, 583.
(2) [1924] A. C. 496.
(3) (1882) 7 App. Cas. 633.
(4) [1924] A. C. 262.
(5) (1888) 38 Ch. D. 520, 530; on appeal sub nom. *Attorney-General* v. *Meyrick* [1893] A. C. 1.
(6) (1842) 1 Ph. 185.
(7) [1896] 2 Ch. 451, 463.
(8) (1805) 10 Ves. 522, 539.

Again the Association is a charity, because it exists for the promotion of religion. Rowlatt J. is wrong in deciding the contrary on the ground that the money for doing it may be subscribed for secular purposes. The evidence here shows that the Association is an institution with religious purposes and independent of the modern movement called Zionism. It is a religious purpose of the Jewish community to return to the Holy Land. Rowlatt J.'s definition of religious purposes is far too narrow. It cannot be limited to spiritual purposes. Rowlatt J. ought not to have looked to the motive of those contributing to the Association. Regard cannot be had to the source of a charitable fund: Tudor's Law of Charities and Mortmain, 4th ed., p. 58; and it follows that regard can still less be had to the motive underlying the creation of the source.

Lastly, the Association is a charity in that its purpose is to benefit the poor. It is immaterial that there is no express mention of the poor in the objects: *In re Lucas*. (1) Here the object is to "settle" Jews in Palestine.

[SLESSER L.J. The word "settle" is wide enough to apply to rich as well as poor.]

If a fund is created for settling Jews it is fair to infer that it is intended to help poor Jews to settle. Well-to-do Jews would need no help.

R. P. Hills (*Sir William Jowitt A.-G.* with him) for the respondents. The Association has sought to show that Rowlatt J.'s judgment cannot stand by contending that each of the various grounds of his decision taken by itself is not enough to support his decision; but the grounds stated must be considered together, and the decision is then seen to be sound. This Association really exists to promote a racial object of a political character, and its objects are therefore right outside those recognized as charitable under the Statute of Elizabeth (43 Eliz. c. 4) and the analogies thereto. Certainly no case has been cited where such an Association as this has been treated as existing for charitable purposes only within s. 37, sub-s. 1 (*b*), of the Income Tax

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(1) [1922] 2 Ch. 52.

Act, 1918. The fact that this Association operates entirely abroad is a material consideration. It cannot be intended to give relief for income tax to an Association whose expenditure is entirely outside this country.

The question has to be decided on the construction of the Memorandum and Articles of Association, and evidence as to the way in which the Association in practice exercises its powers is really irrelevant ; but in point of fact the Commissioners have decided that the character of its operations is not consistent with its being a charity. According to the finding of the Commissioners this is a Zionistic institution, and it is to be noted that no mention is made in the Memorandum of religion. The test here is not whether the Association has power to apply its property for charitable purposes, but whether the property could properly be applied for other purposes. That is clear from the wording of s. 37 itself. Further, Lord Macnaghten's division of charities under four heads does not mean that every purpose falling within one of the heads is necessarily charitable. Every religious purpose is not a charitable purpose, nor is every provision for poor persons charitable. A trust having a political object has never been held to be charitable. The whole arguments in support of the appeal have been directed to getting behind the definition of the objects of the Association in its Memorandum. The main object, as there stated, is to settle Jews in Palestine and Asia Minor. Objection has been taken to the discussion of motive by Rowlatt J., but he was really answering the argument on behalf of the Association, and pointing out that if regard was had to motive it would not help, for it would still appear that the object was racial colonization. That is not a religious purpose.

Further, the objects stated in the Memorandum show that a wide scheme of colonization was intended, and not the mere settlement of poor Jews. There is no ground for reading the word " settle " as applying only to poor persons.

[SLESSER L.J. Para. 3 of the objects contemplates the letting of premises to Jews.]

That is so, and it shows that the colonization intended was not limited to the indigent. There is therefore no ground for saying that the Association exists for the relief of poverty.

Similarly its object is not simply to benefit a class of the community. That may come in, but its real object is to colonize Asia Minor with Jews. It is not enough to say that an Association has a charitable purpose. The purposes must be exclusively charitable, and of such a nature that the Court could, if necessary, administer them: *In re Macduff* (1); *Rex* v. *Special Commissioners of Income Tax* (2); *In re Hummeltenberg* (3); *Attorney-General* v. *National Provincial and Union Bank of England* (4); *Bowman* v. *Secular Society, Ld.* (5); and *Inland Revenue Commissioners* v. *Temperance Council of Christian Churches* (6): See too *General Medical Council* v. *Inland Revenue Commissioners.* (7)

The nearest case to the present is *In re Sidney* (8), when it was held that emigration was not primarily for the benefit of the community; and in *Habershon* v. *Vardon* (9) it was held that a gift towards the restoration of the Jews to Jerusalem was not a good charitable gift. Reference has been made to *Verge* v. *Somerville* (10), but that case has little bearing on the present case, except on the particular point that a fund for the benefit of a class of the community need not be for the benefit of poor persons only. The actual object there came very close to one mentioned in the Statute of Elizabeth. The case cannot properly be relied on to show that assisting emigration is a public purpose.

Latter K.C. in reply. The governing object here is for charitable purposes, and that is all that is necessary: *Inland Revenue Commissioners* v. *Yorkshire Agricultural Society.* (11)

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(1) [1896] 2 Ch. 451, 463, 468.
(2) (1922) 8 Tax Cas. 286, 288.
(3) [1923] 1 Ch. 237, 240.
(4) [1924] A. C. 262, 267.
(5) [1917] A. C. 406.
(6) (1926) 10 Tax Cas. 748.
(7) (1928) 13 Tax Cas. 819, 846, 850.
(8) [1908] 1 Ch. 126, 129; on appeal [1908] 1 Ch. 488, 491.
(9) (1851) 15 Jur. 961; 4 D. G. & Sm. 467.
(10) [1924] A. C. 496.
(11) (1927) 13 Tax Cas. 58.

[LORD HANWORTH M.R. The observation to be made as to that is that the question is one of degree and therefore of fact. In the *Yorkshire Agricultural Society's* case (1) the Commissioners had found that the body had been established for charitable purposes only. Here their decision is the contrary.]

To "settle" Jews means to settle poor Jews, and that is the main object stated in the Memorandum, the letting of premises to Jews subsequently mentioned is an ancillary object with reference to the same class. The same applies to all the other subsequent powers in the Memorandum. Further, the Jews are sufficiently a class of the community for anything benefiting them to fall within the fourth head mentioned by Lord Macnaghten in *Pemsel's* case (2): compare *In re Cohen.* (3)

Cur. adv. vult.

May 21. Their Lordships read the following judgments:—

LORD HANWORTH M.R. This appeal is from a decision of Rowlatt J., who on March 3, 1931, confirmed the decision of the Commissioners for the Special Purposes of the Income Tax Acts refusing relief to the appellants under s. 37 of the Income Tax Act, 1918, on the ground that the appellant Association was not a charity, and that its funds were not applicable to, nor applied to, charitable purposes only.

The Association is a company limited by guarantee forming part of what is known as the Zionist Organization, the objects of which are the restoration of Jews to, and their resettlement upon, the Holy Land.

The case states that the primary object and function of the appellants is the acquisition in perpetuity of land in the Holy Land as the inalienable property of the Jewish people for the purpose of settling Jews on such land.

It should be made clear at the outset that "no part of the income or property of the Association is payable or transferable directly or indirectly by way of dividend, bonus or otherwise, howsoever, by way of profit to the members of the Association, nor, in the event of the winding-up of the Association, are the surplus assets distributable among them."

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(1) 13 Tax Cas. 58.
(2) [1891] A. C. 583.
(3) (1919) 36 Times L. R. 16.

It is unnecessary to repeat the salient facts, which are succinctly set out in the case.

The immunity from income tax which is permitted in certain cases, and upon certain conditions being fulfilled, under s. 37 of the Income Tax Act of 1918, is claimed upon the ground that the appellants fall within the four principal divisions into which charity in its legal sense is stated by Lord Macnaghten in his well known judgment in *Pemsel's* case (1) to be divided.

I state the heads shortly. Trusts for the relief of poverty; for the advancement of education; or religion; and trusts for purposes beneficial to the community not falling under the previous heads.

The right to exemption under s. 37 must be established by those who seek it. The onus therefore lies upon the appellants.

They claim relief from income tax which would in the ordinary course, and unless the appellants bring themselves within the exception, be chargeable upon the interest of 32,000*l.* consolidated stock owned by the appellants and representing donations given to them.

The terms of the section are specific. The relevant sub-s. 1 (*b*) runs "from tax under Schedule C in respect of any interest, annuities, dividends or shares of annuities, and from tax under Schedule D, in respect of any yearly interest . . . . forming part of the income of any body of persons or trust established for charitable purposes only, or which, according to the rules or regulations . . . . are applicable to charitable purposes only, and so far as the same are applied to charitable purposes only."

It will be noticed that the words "charitable purposes only" are thrice repeated. The objects for which the Association is established set out in their Memorandum are very wide, "to purchase . . . . acquire lands, etc., in

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(1) [1891] A. C. 531, 583.

Palestine, Syria or other parts of Turkey in Asia and the Peninsula of Sinai for the purpose of settling Jews on such lands." Then follow twenty-one specified objects and powers ending with a proviso that all these are to be "exercised only in such a way as shall in the opinion of the Association be conducive to the attainment of the said primary object."

Reliance is placed upon this proviso as cutting down the objects and powers of the Association so as to compress them, and force them all to converge to the acquisition of the lands and the purpose of settling Jews upon them. But the proviso is loose, for it leaves the test of what is conducive to the primary object of the Association to the opinion of the Association itself. No outside test is imposed. Hence it is not unfair to say that the Association is to be the interpreter of its objects and powers.

It can build, control and superintend railways, factories, workshops, markets; purchase, develop, deal with and turn to account mines, minerals and precious stones; purchase and acquire any personal property; purchase and carry on businesses suitable for the purposes of the Association; acquire concessions in the prescribed region, and practically do all things necessary to these undertakings and enterprises, or incidental or conducive to these objects—conducive, that is, in their own unfettered opinion and judgment.

The relevancy of considering the width of these terms becomes apparent at once when one turns to the words of Sir George Jessel M.R. in the case of *In re St. Bride's, Fleet Street, Church or Parish Estate.* (1) There he said that in deciding whether the test of charity is fulfilled or not "what the Court has to look to is, the purposes for which the property is held, and the way in which it ought to be applied."

It is unnecessary to trace the source, or determine the motives. The facts as to how it is being used may be laid aside. But the purpose for which the property is held, or ought to be applied, is crucial.

Turning now to the problem whether either of the four characteristics can be found in the Association, it is sufficient

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(1) (1877) 35 Ch. D. 147*n*.

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to say that as to "religion" I agree with the observations of Rowlatt J. on that head. The promotion of religion means the promotion of spiritual teaching in a wide sense, and the maintenance of the doctrines on which it rests, and the observances that serve to promote and manifest it—not merely a foundation or cause to which it can be related. Religion as such finds no place in the Memorandum of the Association.

Then as to "education" there are some items in the details exhibited to the case, of expenditure on schools and schooling. But in my judgment the Association fails to establish that it fulfils the requirements of these heads. It was not established for religious or educational purposes only.

Similarly, relief of poverty does not fit the purpose of the Association. It is true that a scheme which deals with settling Jews on land in a new country away from present unhappy surroundings may be interpreted as mitigating poverty and being chiefly of service to persons in need and distress; but I agree with Rowlatt J. that it is not the improvement of poor Jews and their families that is the characteristic purpose of the Association. It is rather the repopulation of the Holy Land and other lands in a wide area round it, so that once more the population of that district may be Jewish. That is the aim, "the primary object," of the Association.

I turn therefore to the fourth division of Lord Macnaghten. "Trusts for other purposes beneficial to the community not falling under any of the preceding heads." These words have been held to be illustrative and not exhaustive. It is useful to bear in mind when considering this class that "charity" is to be interpreted according to the law of the country where the Commissioners sit: see *Pemsel's* case. (1)

Again, the fact that the activities of the charity are to be exercised abroad does not remove that characteristic from it if it satisfies the tests otherwise: see per Lord Halsbury, *Pemsel's* case (2); and the decision in the case itself; and

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(1) [1891] A. C. 531, 587.

(2) (1891) 3 Tax Cas. 53, 62.

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compare *Verge* v. *Somerville* (1), where a scheme for the repatriation of New South Wales Soldiers was held good.

But there are certain important and broad considerations that must be kept in the foreground. It is not every philanthropic scheme that is charitable. "I am certain Lord Macnaghten did not mean to say that every object of public general utility must necessarily be a charity. Some may be, and some may not be." These are the words of Lindley L.J. in *In re Macduff.* (2) Lord Macnaghten's words as to the fourth class, said Rigby L.J., mean that this head is the one under which valid charities for the general benefit of the community may be ranged, but they do not mean the converse, that every purpose that can be ranged under this head is charitable.

In that case, *In re Macduff* (2), where a bequest had been made "for charitable or philanthropic purposes," it was held that as there may be philanthropic purposes which are not charitable, the bequest failed.

It is necessary therefore to note that a distinction is required to take a benevolent purpose out of the category that is philanthropic and to put it into that which is charitable.

Next, one of the principles that guide the Court to its decision is laid down by Lord Eldon in *Morice* v. *Bishop of Durham.* (3) "As it is a maxim, that the execution of a trust shall be under the control of the Court, it must be of such a nature, that it can be under that control." This maxim is adhered to in the case just quoted by Lindley L.J. (4) There follows a valuable discussion as to what is charitable and what is philanthropic only. I confess that when I recall the wide objects and powers of the Association—that the Jews selected for being settled on the lands secured by the Association, not merely in the Holy Land but anywhere in Turkey in Asia, can be drawn—as, indeed, they are drawn—from all parts of the world—the inference seems to follow that no charitable purpose, as distinguished from a wide

(1) [1924] A. C. 496.
(2) [1896] 2 Ch. 451, 466.
(3) 10 Ves. 522, 539.
(4) [1896] 2 Ch. 463.

philanthropic purpose towards Jews, can be demonstrated. The land and its repopulation is the aim, and the keynote is derived from the passage in the Book of Leviticus to which our attention was drawn.

Indeed, I find it difficult to bring the ambit and purpose of the Association within any of the limits prescribed for a charitable purpose. If the purpose is emigration, that has been held to be indefinite and not necessarily a charitable purpose: see *In re Sidney.* (1)

That the purpose is to deal with, and it may be to benefit Jews is clear; and there is no difficulty or danger to its charitable nature in the term Jews. Like many other terms, it may not be easy to define, but there would not be any difficulty in deciding in actual cases between those within and those without the range of that term for the purpose of the Association.

There is, however, a danger to my mind in too close a consideration of the decided cases. No one case is a clear guide to another depending upon different facts and considerations. As Rigby L.J. said in *In re Macduff* (2), "the cases with regard to charities are innumerable; but in the case of charities, as in all other cases, precedents are only useful in so far as they enable us to deduce a principle." Then he states the principle referred to above that the trust must be sufficiently certain to enable the Court to superintend and give effect to the trust according to its terms, and he points out that if there is an alternative, the general rule comes in that this is a matter too indefinite for the Court to give effect to it.

The judgment of Lopes L.J. in that same case cites the words of Sir William Grant M.R. in *James* v. *Allen* (3): "The whole property might . . . . have been applied to purposes strictly charitable. But the question is, what authority would this Court have to say that the property must not be applied to purposes however so benevolent, unless they also come within the technical denomination of charitable purposes? If it might . . . . be applied to other than strictly charitable purposes, the trust is too indefinite for the Court to execute."

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(1) [1908] 1 Ch. 126.
(2) [1896] 2 Ch. 469.
(3) (1817) 3 Mer. 17, 19.

These considerations apply here. Every sort of activity benevolent and philanthropic as well as charitable can be exercised by the Association. If the Court attempted to intervene in matters which appeared wide of and outside a charitable purpose, the answer could be made by the Association that in their opinion it was conducive to its primary object—the purpose of settling Jews on the lands of Turkey in Asia. That would meet any objection raised as to the powers of the Association, but would it answer Sir William Grant's point? A careful survey of the principles to be applied, and the illustrations found in the cases to which we have been referred, leads me to the conclusion that the decision of the Commissioners was right in law, and that the judgment of Rowlatt J. confirming that decision must be upheld. The yearly interest received by the Association on this fund cannot be held to form part of the income of a body of persons or trust established for charitable purposes only.

LAWRENCE L.J. In this case the Special Commissioners have held that the appellant company is not a body established for charitable purposes only and that its funds were not applicable nor applied to charitable purposes only and consequently that the Commissioners of Inland Revenue were right in refusing to grant exemption from income tax under s. 37 of the Income Tax Act, 1918, in respect of the interest on a sum of 32,000*l.* consolidated stock owned by the company. The decision of the Special Commissioners has been affirmed by Rowlatt J., and the company now appeals to this Court.

The present case involves the somewhat elusive and difficult inquiry not infrequently met with in these cases, whether or not a particular purpose described in an instrument in general terms is a charitable purpose in the legal sense. The instrument with which this case is concerned consists of the Memorandum of Association of the company, and it is essential to bear in mind that in order to obtain exemption from income tax under the section it is not enough that the purposes described in the Memorandum should include charitable purposes, the Memorandum must be confined to those purposes, so that any application by the company of its funds to non-charitable purposes would be ultra vires.

Turning now to the Memorandum it will be seen that the object described in sub-clause 1 of clause 3 is to acquire lands, forests, rights of possession and other rights, easements and other immovable property in Palestine, Syria, and other parts of Turkey in Asia and the Peninsula of Sinai or any part thereof for the purpose of settling Jews on such lands. The Memorandum provides that this object is the primary object of the company and that the powers conferred by the succeeding sub-clauses shall be exercised only in such a way as shall in the opinion of the company be conducive to the attainment of the primary object. The succeeding sub-clauses (of which there are no less than twenty-one) confer very wide powers on the company. I will not attempt to give a complete summary of these powers, it is sufficient to state that they include powers to cultivate and improve any lands of the company and to erect thereon any buildings required for any purposes of the company (sub-clause 2), to let any of the land of the company to any Jews upon any terms (sub-clause 3), to acquire, construct and manage tramways, railways, harbours, docks, hydraulic works, telegraphs, telephones, factories and workshops (sub-clause 4), to purchase, sell, work and develop mines and mining rights and to carry on the business of mining and metallurgy (sub-clause 6), to purchase and sell personal property of all kinds (sub-clause 7), to acquire and undertake all or any part of the business property and liabilities of any person or company carrying on any business which the company is authorized to carry on (sub-clause 9), to make accept endorse and execute promissory notes, bills of exchange and other negotiable instruments (sub-clause 13), to promote any companies for any purpose which may seem likely to directly or indirectly benefit the company and to deal with the shares in any such company (sub-clause 14), to enter into any arrangement for sharing profits with any person or company carrying on or about to carry on any business which the company is authorized to carry on (sub-clause 15), to deal with any moneys of the company not immediately required for any purposes of the company in such manner as the company may deem fit (sub-clause 17), and to make advances to any Jews in the prescribed region upon any security which may be thought fit (sub-clause 18).

The extensive powers conferred on the company by sub-clauses 2 to 22 (to some of which I have referred in order to indicate their character), although purporting to be secondary to the object mentioned in sub-clause 1, are nevertheless objects for which the company is established.

The company can exercise any or all of these powers whenever in its opinion such an exercise would be conducive to the attainment of the so-called primary object, which from a practical point of view means that it can exercise them whenever it is minded to do so, and whether such exercise is in fact conducive to the attainment of that object or not, as neither the Court nor any one else can control the company's opinion or otherwise interfere with the manner in which it chooses to carry out its objects.

It would be difficult in any case to determine whether any particular enterprise undertaken by the company under its wide powers was or was not in fact conducive to the attainment of the primary object, but when the question of whether it is or is not so conducive is left to the decision of the company itself I cannot avoid the conclusion that the objects mentioned in sub-clauses 2 to 22 can be carried out by the company just as freely as the object mentioned in sub-clause 1, and that there is no substantial difference in degree between them.

Moreover the nature of the objects enumerated in sub-clauses 2 to 22 throw a strong light on the true scope and meaning of the object mentioned in sub-clause 1. We have been pressed to hold that this object is strictly confined to acquiring land in the prescribed area for the sole purpose of settling poor Jews upon it. One has merely to glance at the character of the objects mentioned in the succeeding sub-clauses to see how impossible it is to arrive at any such conclusion. For instance such powers as the power to establish construct and manage harbours, docks, hydraulic and electrical works, factories and workshops, and as the power to acquire mines and mining rights, and to carry on the business of mining, seem to me to negative the idea that the sole object of the company was as simple and restricted as is suggested.

Reading the Memorandum as a whole I am of opinion that the real object of the company is to carry out a wide scheme for the acquisition and the agricultural and commercial development of land in the prescribed area, and for the colonization of that land by members of the Jewish race.

Such a scheme (whatever may have been the motive of its promoters for its establishment) is in my judgment altogether outside the purview of the preamble to the Statute of Elizabeth; the purpose which the scheme is designed to effect is not one of the purposes mentioned in the preamble, nor is it analogous to any of those purposes.

The first contention on behalf of the company was that the purpose for which the company was formed was the advancement of the Jewish religion.

Article 25 of the Articles of Association vests the supreme control of the affairs of the company in a committee constituted under the regulations of the Zionist Congress; it is evident therefore that the company's activities are closely connected with the Zionist movement, which I understand to be a movement for securing national privileges and territory for the Jews, especially in Palestine.

Dr. Feldman stated in evidence that in his view the objects of the company were religious, and that this view was mainly based upon Leviticus, chapter 25, verses 23 and 24. It would seem therefore that in his view the dominant purpose of the company was the restoration of the Holy Land to the Jews and the ultimate establishment there of a theocratic constitution. If that be the true view, political and racial considerations would enter largely into the scheme, and it could not be said that the only purpose for which the company was established was the advancement of religion. Moreover I doubt whether the Courts of this country would countenance or give effect to any scheme the carrying out of which might bring the company and its members into conflict with the ruling powers in Palestine: see *Habershon* v. *Vardon*. (1)

In view of the company's connection with Zionism and of Dr. Feldman's evidence, it looks as if the true motives of the founders were that the company, by the exercise of its powers, should try to procure the population of the prescribed area by a preponderating number of Jews as a step towards establishing a Jewish theocracy in Palestine.

However that may be, the answer to the company's contention on this part of the case is that the Court is not concerned with the motives or ultimate aims of the founders nor with the opinion expressed by Dr. Feldman or by any other expounder of the Rabbinic law as to the true character of the objects of the company, but is solely concerned with the meaning and effect of the language employed in the Memorandum.

Reading the Memorandum apart from any preconceived notions as to the aims and aspirations of the founders it will be observed that the primary object of the company is the settlement of Jews on land to be acquired in any part or parts of a large territory including not only Palestine but also the Peninsula of Sinai and the whole of Asiatic Turkey and the development of the land so acquired, and that there is no mention of the advancement of the Jewish religion or of any other religious object. In these circumstances it is impossible to avoid the conclusion that the company is not established for the advancement of religion.

The second contention on behalf of the company was that the company was established for the relief of poverty. This contention is based on the use of the expression "for the purpose of settling Jews on such lands" at the end of sub-clause 1 of clause 3 of the Memorandum. It was said that that word "settling" connotes poverty, and consequently that the primary object of the company is confined to assisting poor Jews to take up their abode in the prescribed area. I find it impossible to give any such restricted meaning to the word "settling" in the context in which it occurs. The relief of poverty is not mentioned, and it is plain from the other objects of the company that its so-called primary object is not confined to settling poor Jews on the lands to be acquired, though no doubt it would include the settlement of such Jews. The development of those lands evidently formed a prominent feature of the scheme as set forth in the Memorandum. For instance, it would clearly be intra vires the company to build suitable dwelling-houses and homesteads on its land for Jewish doctors, lawyers, engineers and farmers and to induce Jews following those avocations to settle in such houses and homesteads, leases of which could be granted to them at economic rents. The Memorandum contemplates (inter alia) the erection of factories and consequently the settlement of manufacturers, and many other examples might be given of settling Jews in the prescribed area under the scheme in which the relief of poverty would play no part. I am therefore driven to the conclusion that the purposes for which the company was established are not confined to the relief of poverty.

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(1) 4 D. G. & Sm. 467.

The third contention on behalf of the company was that even if the company was not established for the advancement of religion or for the relief of poverty, yet it was established for a purpose beneficial to the Jewish community and consequently fell within the fourth division of the well known classification of charities enunciated by Lord Macnaghten in *Pemsel's* case. (1)

The difficult question whether or not a particular purpose not coming within the first three divisions of Lord Macnaghten's classification is a charitable purpose in the legal sense on the ground that it is beneficial to the community has been dealt with in numerous reported cases. It has been pointed out in several of these cases that Lord Macnaghten in describing the fourth class of charities did not mean that every purpose beneficial to the community was necessarily

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(1) [1891] A. C. 583.

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charitable, but that what he really meant was that besides the purposes mentioned in the first three classes there were other miscellaneous charitable purposes which could conveniently be classed under the head of "other purposes beneficial to the community not falling under any of the preceding heads"; see, for example, *In re Macduff* (1), in which case Lindley L.J. stated the rule applicable to this kind of case as follows (2): "We must fall back upon the Statute of Elizabeth, not upon the strict or narrow words of it, but upon what has been called the spirit of it, or the intention of it. As Lord Eldon says, this Court has taken great liberties with charities; but the liberty is always restricted by falling back upon . . . . the Statute of Elizabeth."

Before *In re Macduff* (1) was decided the Statute of Elizabeth had been repealed by the Mortmain and Charitable Uses Act, 1888, but in view of the fact that s. 13, sub-s. 2, of this Act recites the preamble to the Statute of Elizabeth and recognizes it for certain purposes, the reference by Lindley L.J. to the Statute of Elizabeth in his statement of the rule was substantially accurate; at all events the rule has been acted upon by the Courts after as well as before the repeal of that Statute.

Further, it is well established that the fact that the members of the company are prohibited from receiving any profits is not sufficient of itself to stamp the company as a company established for charitable purposes only, although no doubt that fact has to be taken into consideration.

On the other hand the fact that the section of the community to be benefited includes both rich and poor persons does not necessarily prevent the purpose from being charitable in the legal sense: see *Goodman* v. *Mayor of Saltash.* (3)

I have already expressed my opinion that the object for which the company was established does not come within either the words or the spirit of the Statute of Elizabeth, and I have indicated the considerations which have led me to that conclusion; I will only add that I agree with the conclusion reached by Rowlatt J. that the dominant purpose of the company as described in the Memorandum is not so much to benefit the great number of Jews who are contentedly living and earning their livelihood in various parts of the world remote from the prescribed area as to secure that the land in Palestine and the neighbouring territories should be populated by members of the Jewish race and should be developed commercially and agriculturally. Such a purpose cannot in my judgment properly be said to be wholly charitable even in the wide sense in which that term has been interpreted by the Courts of this country.

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(1) [1896] 2 Ch. 451.

(2) [1896] 2 Ch. 467.

(3) 7 App. Cas. 633.

In view of the general and sweeping terms in which the objects of the company are described in the Memorandum the company can, in the prescribed area, embark, without let or hindrance, upon all sorts of undertakings (both public and private) which are not charitable in the legal sense, although some or all of such undertakings might well be of material advantage to persons (of whatever race or religion) living in or travelling through that part of the prescribed area where the undertakings were set up. In those circumstances, although the company under its wide powers may no doubt embark upon strictly charitable enterprises, yet it cannot properly be said to be a company established for charitable purposes only within the meaning of s. 37 of the Income Tax Act, 1918.

For these reasons I agree with the conclusions reached by the Special Commissioners and by the learned judge, and am of opinion that this appeal should be dismissed.

SLESSER L.J. By s. 37, sub-s. 1 (*b*), of the Income Tax Act, 1918, exemption from tax is to be granted in respect of any yearly interest or other annual payment forming part of the income of any body of persons established for charitable purposes only, or which according to the rules or regulations established by Act of Parliament, charter, decree, deed of trust, or will, are applicable to charitable purposes only, and so far as the same are applied to charitable purposes only.

The appellants are an Association limited by guarantee, not having a capital divided into shares, incorporated under the Companies Acts; the certificate of incorporation is dated April 8, 1907.

We have been asked to consider the practice of this Association in disposing of its funds, but such a consideration cannot assist the Court to decide whether the Association is or is not established for charitable purposes only, though it may be relevant when the further question is asked how far the same are applied to charitable purposes only. To determine the first essential question it is necessary to confine the attention to the actual language of the instrument constituting the Association.

This Association, being a limited company incorporated under the Companies Acts, possesses a constitution which is contained in the Memorandum and Articles of Association. It is expressly provided at the end of clause 3 of the Memorandum, which sets out the objects of the Association, that "The primary object of the Association shall be and is hereby declared to be the object specified in sub-clause 1 of that clause, and the powers conferred by the succeeding sub-clauses are to be exercised only in such a way as shall in the opinion of the Association be conducive to the attainment of the said primary object."

This primary object is as follows: "To purchase, take on lease or in exchange, or otherwise acquire any lands, forests, rights of possession and other rights, easements and other immovable property in the prescribed region (which expression shall in this Memorandum mean Palestine, Syria, any parts of Turkey in Asia and the Peninsula of Sinai or any part thereof), for the purpose of settling Jews on such lands."

I have given much attention to the argument that whether the primary purpose is or is not charitable, the many very general powers contained in the subsequent sub-clauses of the object clause make it impossible to say that in any event the objects of the Association as a whole are for charitable purposes only. A conclusion upon this point may be very important, because the objects other than the primary object are undoubtedly expressed in very wide terms. They include powers to deal in one way or another with railways, factories, workshops, mines and personal property, with power to purchase and carry on businesses suitable for the purposes of the Association; and with power to promote any companies for any purpose which may seem likely to directly or indirectly benefit the Association. This last power speaks of purposes which seem likely to benefit the Association, and the language is not easy to reconcile with the proviso that the sub-clauses containing the powers shall be exercised only in such a way as shall be conducive to the attainment of the primary object: that of settling Jews—it points to any purpose which may benefit the Association rather than one to promote the primary object only. There are many other powers which have already been mentioned by the Master of the Rolls and Lawrence L.J. which I forbear to repeat.

Secondly, it must be noted that the Association itself is made by the Memorandum the judge whether the general powers are or are not exercised only in such a way as shall be conducive to the attainment of the primary object. Thus, if the Association were to be reasonably of opinion that the exercise of any of the powers taken was conducive to the attainment of the primary object, it would scarcely be possible to say that such an exercise was ultra vires. The company would not be abandoning the business for which it was established and undertaking another, according to the principles established in *Simpson* v. *Westminster Palace Hotel Co.* (1) and the many cases which have followed it. There may, indeed, be a general philanthropic purpose running through the constitution and objects of this Association, but such philanthropic purposes will not necessarily be charitable within the proper meaning of that word so as to constitute the purposes of the Association purposes which are charitable only: see *In re Macduff* (2) and the cases there cited.

Apart from the limitation to charitable purposes "only," the phrase "charitable purpose" in the section bears the

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(1) (1860) 8 H. L. C. 712.

(2) [1896] 2 Ch. 451, 466.

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same meaning as in the general law: *Commissioners for Special Purposes of Income Tax* v. *Pemsel.* (1) Sir John Simon has based a claim here on all the four well known definitions of charity contained in the judgment of Lord Macnaghten, following the argument in *Morice* v. *Bishop of Durham* (2), in *Pemsel's* case. (3) I propose to deal with these in the order in which he argued them.

First, he argues, that the primary object above cited is an object for the advancement of religion, Lord Macnaghten's third class, but it is to be observed that no specific reference to religion is made in the Memorandum at all. We are asked to inform ourselves from sources other than the Memorandum itself that the object of acquiring land in the prescribed region for the purpose of settling Jews on such land is a religious object according to the Jewish faith. Without in any way disputing or assenting to this proposition, I feel a difficulty in applying it in the present case, for two reasons: in the first place, because, as I have indicated, there is nothing in the constitution of this Association, which alone we have to look at, to support this contention, and, further, because the description of the religious obligation which is set out in the case, more particularly in the affidavit of Solomon Kaplansky, that the land of Palestine is to be made the common property of the Jewish people, is not co-extensive with the definition of the prescribed region in clause 3, sub-clause 1, of the Memorandum, which expression is there said to mean Palestine, Syria, any parts of Turkey in Asia and the Peninsula of Sinai or any part thereof. It is necessary to satisfy the Statute that the purposes relied upon shall be charitable purposes only, and, although the Commissioners appear to have found that the Association (which is said by the Case stated to be part of the Zionist Organization) has for its objects and function the acquisition in perpetuity of land anywhere in the Holy Land, the Memorandum in terms includes among the territory on which Jews may be settled the whole of Turkey in Asia and Syria as part of the prescribed region. Thus, so far as the settlement of Jews in parts of the prescribed region other than the Holy Land is concerned, the purpose could not be religious, even on Dr. Feldman's evidence or on Mr. Kaplansky's view as contained in his affidavit annexed to the Case, and thus, in any event, at most only a part of the purposes of the Association would be charitable as being religious, and the purposes as a whole would not be charitable only.

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(1) [1891] A. C. 531.

(2) (1804) 9 Ves. 399.

(3) [1891] A. C. 583.

Secondly, it was argued that there was here a charitable purpose for the relief of poverty, Lord Macnaghten's first class. It was said that the phrase in clause 3, sub-clause 1, of the Memorandum, "settling Jews on such lands," imports the relief of the indigent. This argument seems to me to some extent to conflict with the religious argument, for on the basis of religion it is clear that no distinction can be made regarding the economic status of Jews; from the religious aspect all Jews are said to be equally the subject of settlement in the Holy Land. But I think the argument as to the relief of poverty should be considered by itself unaffected by any apparent difficulties produced by the former argument which I have rejected. Some guidance as to the meaning of the word "settling" on which reliance is to be placed is to be found in sub-clause 3 of clause 3 of the Memorandum. In that sub-clause one object for which the Association is established is said to be "to let any of the land or other immovable property of the Association to any Jews upon any terms." I think that while it may well be that the object of settling Jews may not necessarily involve the letting of land to them, yet I think that sub-clause 3 does indicate that the letting of land to any Jews upon any terms is one method of settling them, so that at any rate to some extent it is contemplated that the settlement may be achieved through the payment of rent by the settlee, and, in sub-clause 8 of the Memorandum there is express power given to collect rents. I am inclined to agree that the word "settlement" does include, on the face of it, in part, an assistance of the indigent, but the phrase is indefinite and may well cover the settlement of those who are not indigent. In *In re*

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Sidney (1), where a bequest in trust was "for such charitable uses or for such emigration uses or partly for such charitable uses and partly for such emigration uses" as the trustees shall think fit, the bequest was held to be void for uncertainty, as emigration uses are indefinite, and are not necessarily charitable. It was there argued that though rich persons may emigrate they do not require assistance, nor are they called emigrants. Swinfen Eady J., as he then was, said (2): "Emigration is not confined to the poor . . . . there are many modes of application that would come within the phrase 'emigration uses' but would not come within the assistance of poor persons." I think the like observation is appropriate to the word "settle." I find it therefore impossible to hold that the settling of Jews on lands in the prescribed region without qualification is a purpose for the relief of poverty only or is a charitable purpose only.

The second of Lord Macnaghten's definitions, the advancement of education, is not in terms mentioned in the Memorandum, though it does appear in fact that much money has been devoted to this object, and I pass, therefore, to the fourth definition namely, "trusts for other purposes beneficial to the community not falling under the preceding heads" of poverty, education and religion.

Under this head it is not necessary to confine the charity to the poor to the exclusion of the rich: see *Goodman* v. *Mayor of Saltash* (3); *Verge* v. *Somerville*. (4) It is pointed out by Rowlatt J. that the constitution of the Association eliminates any idea of private profit. He holds, and I agree with him, that the primary purpose of this Association is to populate the Holy Land with a particular class of inhabitant. My only qualification would be to substitute the words "prescribed region" for Holy Land, but in considering whether the purpose is for a charitable purpose as being "for purposes beneficial to the community," this amplification of object is not perhaps very material.

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(1) [1908] 1 Ch. 126.

(2) Ibid. 129.

(3) 7 App. Cas. 633.

(4) [1924] A. C. 496.

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It may be said that there is a degree of uncertainty about the word "Jew" which makes it difficult to say that the Jews are sufficiently a community to be benefited as a charity and that the alleged charity is bad for uncertainty. In this view, it may be urged that it is not clear in the Articles of this company whether the power to settle is to be confined to persons practising the Jewish religion, which may include persons not of Jewish race (such, for example, as the late Lord George Gordon, who, after becoming notorious in leading anti-Catholic riots, became a Jew) or whether it extends to persons wholly or partly of Jewish race who are not members of that religious communion. But I have come to the conclusion that, giving a fair construction to the whole objects of the Association, the persons to be benefited are persons who are Jews in the religious sense. If this be so, I think that such persons may fairly be called a community. In the words of Lord Wrenbury in *Verge* v. *Somerville*, in giving the judgment of the Privy Council (1) : "To ascertain whether a gift constitutes a valid charitable trust . . . . a first inquiry must be whether it is public—whether it is for the benefit of the community or of an appreciably important class of the community. The inhabitants of a parish or town, or any particular class of such inhabitants, may, for instance, be the objects of such a gift, but private individuals, or a fluctuating body of private individuals, cannot." After pointing out that poverty is of necessity an exclusive ingredient, he draws attention to the *Christchurch Inclosure Case* (2), in which Lindley L.J. said (3) : "Although the occupiers of these cottages may have been, and perhaps were, poor people, the trust is not for the poor occupiers, but for all the then and future occupiers, whether poor or not. . . . . The trust is for a comparatively small and tolerably well defined class of persons. . . . . The class, however, though limited, is as to its members uncertain, and is liable to fluctuation, and the trust for the class is perpetual."

(1) [1924] A. C. 499.
(2) 38 Ch. D. 520.
(3) 38 Ch. D. 530.

As regards uncertainty of the class to be benefited the word " Jew " in English law has almost always been confined to persons practising the Jewish religion; the disabilities of Jews have not attached to persons of Jewish race who have become baptized. Thus, they are generally described in Acts of Parliament and in legal documents as persons practising the Jewish religion (see the Toleration Act, 1846), and Jewish religious endowments and trusts are now recognized and executed by the Courts and regarded as charitable purposes: *In re Michel's Trust.* (1) The Ballot Act of 1872 speaks of voters of Jewish persuasion. In *In re Cohen* (2) Peterson J. appears to have treated a bequest for the benefit of deserving Jewish girls on their marriage as being for the benefit of Jewish religion, and thus gave to the word "Jewish" its religious denotation.

There is recent authority for saying that the fact that the persons to be benefited may be aliens and their benefit to take place abroad will not prevent such persons being a part of the community for charitable purposes. In *In re Robinson* (3) Maugham J. decided that a testamentary gift to the German Government for the time being for the benefit of its soldiers disabled in the war was a valid charitable gift. He said (4): " There was no objection to the gift from the point of view that the persons who were the object of the charity were abroad," and he did not see " how it could be contrary to public policy to benefit persons who had been enemies and had ceased to be enemies."

For these reasons, were the purposes of this Association confined to the settlement of Jews in the prescribed region I should have hesitation in saying that the purposes were not the benefit of a class of the community only within the intent of the Elizabethan Statute, and thus charitable purposes within s. 37 of the Act of 1918. The ground on which I have come to the conclusion that the appellants fail in bringing themselves within this definition is because of the breadth of the powers contained in their Memorandum, which may all be philanthropic but are certainly not necessarily all charitable. As I have already said, the Memorandum constitutes the Association the judge of how far the exercise of these very general powers is or is not conducive to their primary object, so that even were it possible to say that some of the purposes of the Association were charitable, it is not possible to say that its income is applicable to charitable purposes only.

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(1) (1860) 28 Beav. 39.

(2) 36 Times L. R. 16.

(3) (1931) 47 Times L. R. 264.

(4) Ibid. 265.

For this reason I think that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Herbert Baron & Co.; Solicitor of Inland Revenue.*

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Revenue—Sur-tax—Company—Dividend—Deduction for Tax—Mode of Computation—Gross Amount returnable in Shareholder's Return of total Income—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedules Rules, r.* 20 *—Finance Act,* 1924 (14 *&* 15 *Geo.* 5, *c.* 21), *s.* 33*—Finance Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *ss.* 38, 39.

Rule 20 of the All Schedules Rules to the Income Tax Act, 1918, provides that the profits or gains to be charged on a company shall be computed in accordance with the provisions of the Act on "the full amount of the same before any dividend thereof is made" and that the company "paying such dividend shall be entitled to deduct the tax appropriate thereto":—

Held, that by "the tax appropriate thereto" was meant the tax at the standard rate on the gross amount of the dividend paid by the company and not a proportionate part of the tax paid by the company in the year in which the dividend was paid in respect of its profits or gains; and, therefore, that in making the return of his total income for the purpose of sur-tax the shareholder must include the gross amount of the dividend, and not the proportionate part of the total income on which the company had borne tax for the year of assessment in which the profits distributed were made.

Decision of Rowlatt J. affirmed.

APPEAL from a decision of Rowlatt J. on a Case stated under the Finance Act, 1927, s. 42, sub-s. 7, and the Income

Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts, held on October 23, 1930, Mr. Frederick Howard Hamilton (hereinafter called "the appellant") appealed against an assessment to sur-tax in the sum of 35,805*l.* for the year ending April 5, 1929.

2. The appellant was the holder of 67,500 shares out of a total issue of 150,000 shares of 1*l.* each in the Transvaal Agency, Ld., a company incorporated in England under the Companies Acts.

3. In making his return of his total income for the year in question for the purposes of sur-tax the appellant included a sum of 27,000*l.* in respect of dividends from the company, made up of a dividend of 10 per cent., or 6750*l.* gross, payable on June 30, 1928, out of the profits for the year to June 30, 1927, and a dividend of 30 per cent. or 20,250*l.* gross, payable on February 12, 1929, out of the profits for the year ended June 30, 1928. At the time of making this return the appellant made application for relief under s. 34 of the Finance Act, 1927, on account of the income from the shares of the company received in the year being attributable to a period exceeding a year. This application was granted, and the assessment under appeal was made in accordance with the appellant's return, but subject to an appropriate measure of relief under s. 34—namely, the allocation of the dividend paid on June 30, 1928, to the super-tax year 1928–29.

4. The appellant appealed against the assessment on the ground that he had made an error in including in his return the full amount of the dividends declared by the company in respect of his shares, inasmuch as the total sums distributed by the company by way of dividend in respect of the years ending June 30, 1927, and June 30, 1928, respectively exceeded the "statutory income" of the company for those years (i.e., the total amount on which the company had borne or been liable to income tax by deduction or direct assessment, less the amount of interest or other annual payments on which it had recovered tax by deduction), and he was now

advised that his income from the company for the purposes of sur-tax could not exceed that proportion of the company's income which had been received by him.

5. The company received a substantial income from dividends and interest on investments, on which it suffered tax by deduction, and it paid considerable amounts of annual interest under deduction of tax. It also received some fees assessable under Sch. E, and engaged in trading operations the profits from which were assessable under Case I. of Sch. D. The profits or losses arising from these trading operations, as adjusted for the purposes of income tax, were as follows :—

Year ending June 30, 1925 . .	Loss of 2387*l.*
,, ,, ,, ,, 1926 . .	Loss of 4268*l.*
,, ,, ,, ,, 1927 . .	Profit of 16,797*l.*
,, ,, ,, ,, 1928 . .	Profit of 39,274*l.*
11 months ending May 31, 1929 .	Loss of 2699*l.*

On May 31, 1929, the company sold its business and went into liquidation.

6. For the year ending April 5, 1927, the assessment on the company under Case I. of Sch. D was nil, as on the average of the preceding three years its trading operations had resulted in a loss. For the years 1927–28 and 1928–29 s. 29, sub-s. 3, of the Finance Act, 1926, was applied, and the average of the three preceding years was taken as the basis of assessment in lieu of the profits of the preceding year. For 1927–28 the result on average was again a loss, and the assessment under Case I. of Sch. D was nil. For 1928–29 an assessment was made in the first instance in the sum of 3381*l.*, being the average of the three years ending June 30, 1927, but in consequence of the sale of the company's business on May 31, 1929, an additional assessment of 3643*l.* for 1928–29 was subsequently made under s. 31, sub-s. 1 (*b*), of the Finance Act, 1926, increasing the amount on which the company was charged under Case I. of Sch. D to 7024*l.*, a figure arrived at by deducting approximately 9-11ths of the loss of 2699*l.* for the eleven months ending May 31, 1929, from approximately one-fourth of the profit of 39,274*l.* for

the year ending June 30, 1928. For the period beginning April 6 and ending May 31, 1929, there was no liability by reason of the operation of s. 31, sub-s. 1 (*a*), of the Finance Act, 1926.

7. The gross amounts on which the company was charged to tax by deduction or direct assessment were 18,140*l.* for the year ending April 5, 1927, 17,774*l.* for the year ending April 5, 1928, and 25,284*l.* (including the above mentioned assessment of 7024*l.* under Case I. of Sch. D) for the year ending April 5, 1929. It paid interest amounting to 4543*l.* for 1926–27, 3953*l.* for 1927–28, and 6205*l.* for 1928–29, so that the amounts on which, prior to the payment of dividends, the company in fact bore and was chargeable to tax (referred to by the appellant as its "statutory income") were 13,597*l.* for the year ending April 5, 1927, 13,821*l.* for the year ending April 5, 1928, and 19,079*l.* for the year ending April 5, 1929.

8. For the year ending June 30, 1927, the company made a commercial profit as shown in its profit and loss account of 27,436*l.* 17*s.* 2*d.*, which, with a carry forward of 7590*l.* 19*s.* 8*d.* from the previous year, brought the balance standing to the credit of profit and loss account in the balance-sheet at that date to 35,027*l.* 16*s.* 10*d.* For the year ending June 30, 1928, the company made a commercial profit of 48,702*l.* 13*s.* 6*d.*, which, with the addition of the carry forward from the previous year, brought the total amount carried to the appropriation account to that date to 83,730*l.*

9. The question of the payment of a dividend was considered by the directors of the company on June 29, 1928, before the accounts for the year ending on the following day had been made up, and it was resolved to pay an interim dividend of 10 per cent. less income tax on June 30, 1928, in respect of the year ending June 30, 1928. This resolution was reconsidered and modified at a meeting of the directors held on November 19, 1928, when it was resolved that the dividend so declared should be treated as a distribution out of the profits for the year to June 30, 1927. The declaration as thus modified was approved and confirmed at the annual general meeting of the company held on February 12, 1929,

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and at the same meeting it was resolved that a dividend of 30 per cent. less income tax be declared in respect of the year ended June 30, 1928.

10. The gross amounts of the profits absorbed by the payment of these dividends were 15,000*l.* for the year to June 30, 1927, and 45,000*l.* for the year to June 30, 1928.

11. If the "statutory income" of the company, as set out in para. 7 above, for the three years ending respectively April 5, 1927, April 5, 1928, and April 5, 1929, were apportioned on a time basis to the company's own years of account, the company's "statutory income" for the years ending respectively June 30, 1927, and June 30, 1928, would be calculated approximately as follows:—

Year to June 30, 1927:—

3/4ths of 13,597*l.* (statutory income of year to April 5, 1927) . . . . . =	10,197*l.*
1/4th of 13,821*l.* (statutory income of year to April 5, 1928) . . . . . =	3,455*l.*
Total .	13,652*l.*

Year to June 30, 1928:—

3/4ths of 13,821*l.* (statutory income of year to April 5, 1928) . . . . . =	10,365*l.*
1/4th of 19,079*l.* (statutory income of year to April 5, 1929) . . . . . =	4,770*l.*
Total .	15,135*l.*

12. On June 30, 1928, a warrant or cheque for 5400*l.* was forwarded by the company to the appellant, accompanied by a certificate in compliance with the provisions of s. 33 of the Finance Act, 1924, showing the gross amount of the dividend paid to him as 6750*l.*, and the amount of tax deducted at 4*s.* in the £ as 1350*l.* Similarly, on February 13, 1929, a warrant or cheque for 16,200*l.* was forwarded by the company to the appellant, accompanied by a certificate showing the

gross amount of the dividend paid to him as 20,250*l.*, and the amount of tax deducted at 4*s.* in the £ as 4050*l.*

13. The amounts included in respect of these dividends in the appellant's return of total income and in the assessment made upon him to sur-tax were the gross amounts shown in the above mentioned certificates. The appellant now claimed that there should be substituted 67,500/150,000ths of the amounts of 13,652*l.* and 15,135*l.* as set out in this Case, or of amounts approximating thereto.

14. The appellant has made a claim against the liquidator of the company for repayment of income tax, which he alleges was deducted from the dividends in excess of the amounts which the company was entitled to deduct. This claim has not yet been dealt with by the liquidator.

It was contended on behalf of the appellant :—

(*a*) That under r. 20 of the General Rules applicable to all Schedules of the Income Tax Act, 1918, a company is treated in the same way as an unincorporated body of persons. In both cases the profits or gains of the body of persons are charged on the body as a whole, and when those profits or gains are distributed among the constituent members no fresh income arises, no further assessment to income tax can be made, and the body cannot deduct more tax or inflict on its members any liability to tax in excess of what it has itself suffered.

(*b*) That r. 21 of the General Rules is not applicable to the dividends of a company.

(*c*) That s. 5, sub-s. 3, of the Income Tax Act, 1918, s. 33 of the Finance Act, 1924, and s. 39 of the Finance Act, 1927, are merely machinery affecting the date at which income is to be taken into account in computing the total income of individual members and the rate of deduction of income tax, and do not affect the amount to be included by the members in their returns of total income.

(*d*) That the amount on which the company or other body of persons is charged to income tax is the maximum amount distributable as income among the members, and that the amounts returnable by the individual members in their statements of total income for the purposes of sur-tax or reliefs or repayments cannot exceed their respective shares of the total amount on which the body of persons is charged to income tax.

(*e*) That the case was concluded by the decision in *Gimson* v. *Inland Revenue Commissioners.* (1)

It was contended on behalf of the Crown (inter alia) :—

(*a*) That the company, in distributing its profits, was entitled to deduct, and had, in fact, deducted, tax at the standard rate on the gross amount of the dividends paid, and that the appellant was bound to allow the said deduction.

(*b*) That the gross amount of the dividends from which tax had been so deducted was properly included in the appellant's return of his total income for the purposes of sur-tax.

(*c*) That the case of *Gimson* v. *Inland Revenue Commissioners* (1) was distinguishable.

The Commissioners who heard the appeal gave their decisions in the following terms :—

" Apart from the decision in *Gimson's* case (1) we should not feel any doubt or difficulty about this case. The company has in the ordinary course paid dividends out of its annual profits or gains, which consisted partly of trading profits and partly of interest and dividends taxed by deduction, and which fell wholly within the charge to income tax. In paying these dividends the company has, as it was entitled to do according to the words of r. 20, deducted the tax appropriate thereto, which is defined by s. 39, sub-s. 1, of the Finance Act, 1927, as tax at the standard rate for the year in which the amount payable became due. A shareholder, in making his return of total income for that year, would naturally include ' the gross amount which, after deduction of the income tax appropriate thereto, corresponds to the net amount actually paid,' as shown on the counterfoil of the dividend warrant issued in compliance with s. 33 of the Finance Act, 1924. If such total income was shown to be less than the amount involving him in liability to income tax, he would be able to obtain repayment of the tax deducted without any

(1) [1930] 2 K. B. 246.

question; if the total income exceeded 2000*l.* he would be charged sur-tax accordingly, and on the face of it there would be no ground for disputing the charge.

"It is, however, contended that this case is governed by the reasoning in *Gimson's* case (1), and that on examination of the company's income tax liabilities it will be found that the amount to be included in the computation of the shareholder's total income for the purpose of repayment or sur-tax is not the gross amount of the dividends received by him, but is limited to his aliquot proportion of the company's 'statutory' income, or total income from all sources as measured by aggregating the amounts on which the company has borne tax by deduction or by direct assessment for the year, or portions of years, of assessment in which the profits distributed were made.

"*Gimson's* case (1) was treated as involving a point which may not often arise in practice, and it related to a distribution, without deduction of tax or any expression that the payment was free of tax, of a fund consisting of realized capital profits and other profits which were assumed to have entirely escaped liability to income tax by reason of the operation of the rules for the measurement of assessments. We do not think that the decision was intended to apply to the ordinary case of a distribution, under deduction of tax, of dividends out of the annual profits of a company, or to disturb the general practice in regard to the treatment of such dividends for the purposes of repayment, super-tax, or sur-tax. As a consequence of the system of measuring assessments by the results of a previous period, the assessments on a company seldom correspond in amount, even approximately, to the profits of the year of assessment which are taxed by those assessments, and it is not uncommon for the profits available for distribution by way of dividend to exceed the amount of the assessments (or of the proportions of such assessments if the company's accounting period does not coincide with the income tax year) for the period in which the profits were made. Nevertheless, it is, and always has been, the almost universal practice to deduct from the gross amount of the dividend the tax appropriate to that amount, or, if the dividend is declared to be 'free of tax,' to treat it, for the purposes of computing total income, as equivalent to the gross amount which, after deduction of the appropriate tax, corresponds to the net amount actually paid, without any reference to the amount of the company's 'statutory' income. This method of dealing with dividends is one of the accepted conventions under which the Income Tax Acts are regularly administered, and it is consistent with the actual words of the Acts; the method, which, it is suggested, should be substituted would, as a matter of general practice, be unworkable, and would be difficult to reconcile with the language of s. 39 of the Finance Act, 1927. An exception to the general rule has, in recent years, been admitted in a few special cases where it has been clear that the payment of a dividend was, in whole or in part, a distribution of profits which, by reason of their capital nature, were not within the charge to income tax. This exception has now been recognized, and, in a very peculiar case, extended to cover a distribution of a fund which was treated as wholly untaxed, but it does not appear to us that this decision necessitates a reversal of the general practice or the adoption of a process of close investigation of assessments and elaborate calculations for the purpose of arriving at an artificial figure to represent the income of a shareholder in respect of a dividend paid in the ordinary course and under deduction of tax out of a company's annual profits or gains.

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(1) [1930] 2 K. B. 246.

"In our opinion the gross amount of the dividends has been rightly included in the computation of the appellant's total income, and we confirm the assessment."

On appeal Rowlatt J. said that it had been contended that the question which arose in this case was concluded in favour of the appellant by *Gimson's* case. (1) That was a case where a sum had been paid by way of dividend from which no tax was deducted because none was payable for the particular year by the company. It was said that the amount of the

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(1) [1930] 2 K. B. 246.

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dividend was a taxable sum and ought to be included in the shareholder's return for super-tax purposes, but he had held that this was not so. In order to make that case an authority in the present case, it must be regarded as negativing the view that as a matter of general application regard must be had to the statutory income of the company to ascertain whether the dividend was part of the sum taxable as profits or gains. That point was never discussed in *Gimson's* case (1), and if such a contention had been made it would have failed. Here tax was deducted at the rate applicable in paying the dividend, and the real question was whether for abatement purposes and therefore for super-tax purposes you could go behind that deduction. The system in existence ever since s. 163 of the Income Tax Act, 1842, came into force had been that a taxpayer entitled to a return of tax could get back the amount of tax deducted from his dividends without regard to the assessment of the company. He (his Lordship) wished to say nothing upon the point whether, as between the shareholder and the company, the shareholder could get any modification of the amount deducted. But when a deduction had been made, which was apparently perfectly regular, the deduction stood for the purpose of abatement and therefore for the purpose of super-tax also.

The appellant appealed.

Needham K.C. and *Scrimgeour* for the appellant. It is the company's duty to pass on to the shareholder as his deduction for tax the proportionate part of what the company itself has paid in tax. That is under the All Schedules Rules, r. 20, to the Income Tax Act, 1918, which took the place of s. 54 of the Income Tax Act, 1842. No doubt the practice has been to deduct the tax which the gross dividend would be liable to bear, but that practice does not accord with the law. If this contention is right, it follows that for sur-tax purposes the same principle should apply. The company has no power to pass on to the shareholders a larger tax than it has paid, and as the company is always assessed on the

(1) [1930] 2 K. B. 246.

preceding year's income, there will constantly be a difference between the tax paid by the company and the tax which the dividends as income would normally bear. No difficulty will arise in practice, for the company will show on the counterfoil supplied the tax in fact deducted. That duty will be performed by the secretary under s. 22, sub-s. 2, of the Finance Act, 1907. Rule 20 only refers to a "body of persons," but by s. 237 this expression includes a company. Sect. 54 of the Act of 1842 provides for the shareholder's allowing "out of such dividends a proportionate deduction in respect of the duty so charged" on the company. Those words clearly indicate that the appellant's contention is right, and as the wording of r. 20 is doubtful, regard can be had to the old section to see what was intended.

[LORD HANWORTH M.R. A variation in the language of r. 20 may indicate a change of intention by the Legislature.]

It is contended that r. 20 has the same meaning when it provides that the company paying a dividend "shall be entitled to deduct the tax appropriate thereto." Rule 19 makes clear the intention when an annual payment is made out of income already brought into charge. It is that the payer shall make a deduction in making the payment of "a sum representing the amount of the tax thereon." Rule 20 departs from this provision, and must be intending something different when it says that in the case of dividends the company shall be entitled to deduct the tax "appropriate thereto." Tax "appropriate thereto" means the proportionate part of the tax paid by the company: see per Lord Phillimore in *Bradbury* v. *English Sewing Cotton Co., Ld.* (1), and per Lord Cave in *Inland Revenue Commissioners* v. *Blott* (2); compare also *Attorney-General* v. *Metropolitan Water Board.* (3)

There is nothing contrary to this argument in s. 33 of the Finance Act, 1924, which provides for a statement in writing being furnished with a dividend payment showing the gross amount which "after deduction of the income tax appropriate thereto" corresponds to the net amount paid, the rate and amount of tax appropriate to such gross amount, and the net amount actually paid. Sect. 39 of the Finance Act, 1927, merely fixed in an arbitrary way the rate of the tax to be deducted. Sect. 38 imposed sur-tax instead of super-tax. By that Act sur-tax became income tax at a rate over the standard rate, and therefore if for income tax purposes the company can only pass on the proportion of the tax paid by it the same must be true as to sur-tax.

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(1) [1923] A. C. 744, 769, 770.

(2) [1921] 2 A. C. 171, 201.

(3) [1928] 1 K. B. 833, 850.

[LAWRENCE L.J. Under r. 20 the company is not bound to deduct tax, and if it did not, would not the recipient be assessed to tax in respect of the dividend paid to him ?]

It is submitted not. The Revenue having received tax on the profits of the company is not concerned with what happens to those profits. No other person is to be assessed or charged in respect of them, and if the company paid a dividend without deduction, the shareholder would still not be assessable in respect of it. Rule 21, which permits assessment, does so only when a payment is made out of money not already brought into charge : see *Gimson* v. *Inland Revenue Commissioners* (1), which is directly in point in the present case. If r. 20 were absent, then in so far as the tax was paid out of profits which had borne tax r. 19 would have applied, and in so far as it was paid out of profits which had not borne tax, r. 21 would apply, so to that extent the Crown's present contention would have been well founded. Rule 20, however, makes a different rule applicable, and it is exhaustive in regard to dividends. Lord Phillimore's statement in *Bradbury's* case (2), which has already been referred to, receives support from what was said in *Singer* v. *Williams*. (3)

[They also referred to *Inland Revenue Commissioners* v. *Dalgety & Co., Ld.* (4)]

Sir William Jowitt A.-G., *Sir Stafford Cripps S.-G.*, and *R. P. Hills* for the respondents. The appellant is here seeking to set aside the established practice of ninety years. The matter is of importance not only to the Revenue authorities but also to the small taxpayer. If the appellant's contention

(1) [1930] 2 K. B. 246.
(2) [1923] A. C. 769, 770.
(3) [1921] 1 A. C. 41, 50.
(4) [1930] 1 K. B. 1.

were right it would seem to follow that if in any year shareholders of a company received by way of dividend only half of the profits that had borne tax the shareholders might logically be liable to a tax of double the standard rate. The result of a decision in favour of the appellant's contention would be to cause a breakdown in the whole system of deduction at source, and for this reason a financial resolution (1) has recently been passed which retrospectively validates the practice always in force in regard to dividends. At the same time a decision is desired independently of the resolution, for, if the appeal was dismissed merely because of the resolution, the Crown would ask the Court to dismiss the appeal without costs.

The question here turns entirely on r. 20 of the All Schedules Rules, and there is no ground for referring back to s. 54 of the Act of 1842. If necessary it could be contended that the practice that has been in force was justified under that section. But in any case there was in r. 20 a significant alteration in the language employed. The tax deducted has to be " appropriate " to the dividend. This can only mean the tax that a sum equal to the dividend would have to bear. Rule 20 left two matters still at large—namely: (1.) the amount from which the deduction has to be made, and (2.) the rate of tax. These questions are answered by the Finance

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(1) The resolution which was passed on May 5, 1931, and was given temporary statutory force by the Provisional Collection of Taxes Act, 1913 (3 Geo. 5, c. 3), provides: " That Rule 20 of the General Rules shall in relation to a dividend paid by any body of persons, whether before or after the passing of this Resolution, be construed as authorising the deduction of tax from the full amount paid out of profits and gains of the said body which have been charged to tax or which under the provisions of the Income Tax Acts, would fall to be included in computing the liability of the said body to assessment to tax for any year if the said provisions required the computation to be made by reference to that year and not by reference to any other year or period, and for all the purposes of the Income Tax Acts any such dividend, not being a preference dividend to which s. 12 of the Finance Act, 1930, applies, shall, to the extent to which it is paid out of such profits and gains as aforesaid but subject to the provisions of sub-s. 3 of the said s. 12, be deemed to represent income of such an amount as would, after such deduction of tax as is authorised by the said Rule, be equal to the net amount received."

Act, 1924, s. 33, and the Finance Act, 1927, s. 39, respectively. To be more accurate, s. 33 of the Act of 1924 provided for the shareholder's being told the amount from which the deduction was made.

The dicta in *Bradbury's* case (1) and *Blott's* case (2) relied upon by the appellant were dicta in regard to s. 54 of the Act of 1842 and not r. 20 of the All Schedules Rules to the Act of 1918; and in *Dalgety & Co., Ld.'s* case (3) the Master of the Rolls stated definitely that "the tax deducted is paid on quite a different account from that of the deduction" and this is fatal to the appellant's contention: compare *Scottish Union and National Insurance Co.* v. *New Zealand and Australian Land Co.* (4), which is there referred to as supporting this view; and *Ashton Gas Co.* v. *Attorney-General.* (5) The appellant's whole argument is fallacious in ignoring that the company does not pay tax on its profits as the agent of the shareholders. In *Rover* v. *South African Breweries* (6) Astbury J. held that the company paid tax as agent for the shareholders, but this decision was reversed in the *Scottish Union* case. (4) As regards *Gimson's* case (7) it is not admitted that the decision is right, but for the purposes of this Case it is not necessary to decide so. It was treated as a case where there was a profit not liable to tax, and it is sufficient for the purpose of distinguishing it to say that the appellant was the recipient of a dividend out of profits which were subject to tax.

[They were stopped.]

Scrimgeour replied.

LORD HANWORTH M.R. This appeal fails. It raises a very important point, for if the appellant's contention was accepted it would alter, if not entirely upset, the system under which deductions of tax are made upon dividends paid to shareholders.

(1) [1923] A. C. 769, 770.
(2) [1921] 2 A. C. 201.
(3) [1930] 1 K. B. 1, 28.
(4) [1921] 1 A. C. 172.
(5) [1906] A. C. 10.
(6) [1918] 2 Ch. 233.
(7) [1930] 2 K. B. 246.

It arises upon these facts. The appellant is a shareholder in the Transvaal Agency, Ld., a company incorporated in this country under the Companies Acts. He was the holder of 67,500 shares, out of a total issue of 150,000 shares of 1*l.* each in that company. He was paid a dividend, and the question is whether or not the sum that was deducted from that dividend was correct or not. The question arose on the payment of his sur-tax. We have been accustomed for a number of years to the payment of income tax which was (not originally, but substantially for modern purposes) imposed by the statute of 1842. Super-tax was imposed later by s. 66 of the Finance (1909–10) Act, 1910, and it was then called "an additional duty of income tax." It was necessary that income tax should be paid, either by the taxpayer making a return or by his suffering a deduction from sums that he received; but with regard to super-tax it was necessary for the person who was liable to that tax to make a return of the total income that he had received in the year of charge. In order to make a return of his total income, it was important for him to enumerate not merely the sums which he had received, without any deduction from them, but also to incorporate in his return the sums from which a deduction had been made before payment to him. In order to see what the value of those sums was, it was important that he should add to the sum actually received the sum which had been deducted from it. Unless such an addition was made, the true value to him of the sum received was not appreciated. Similarly if he had received some dividends or sums paid to him free of tax, it became necessary, as pointed out in a number of cases, including *Ashton Gas Co.* v. *Attorney-General* (1) and *Samuel* v. *Inland Revenue Commissioners* (2), to treat him as receiving not merely the sum actually paid to him, but an immunity from charge to tax, the money value of which must be added to the sum or benefit which he had received, so as to ascertain the totality of his income on which super-tax was to fall.

(1) [1906] A. C. 10.

(2) [1918] 2 K. B. 553.

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By s. 38 of the Finance Act, 1927, a different method is now adopted. There is a tax which is to be charged at the standard rate, and that standard rate is the equivalent of what may be called income tax. If and so far as there is something super-added to that standard rate, that is called sur-tax, and takes the place of super-tax. At the time when this question arose it was sur-tax that was being charged; and it was necessary for the appellant to make his return, and to be assessed in respect of the sur-tax upon his income, his income reaching a total which brought him within the ambit of the sur-tax.

As I have said, he was a shareholder, and received a dividend upon his shares in the Transvaal Agency, Ld. I take the facts now from paras. 12 and 13 of the Case. [His Lordship read para. 12.] It will thus be seen that in the year ending April 5, 1929, which is the year in question, Mr. Hamilton had received in fact two sums; but had in one case 1350*l.* and in the second case 4050*l.* deducted from the gross amount payable to him as being deductions justified by the company's holding back tax at 4*s.* in the £. As pointed out in the paragraph that I have read, the particulars that are given are now required to be given by s. 33 of the Finance Act, 1924. That section requires certain details to be given, so that the shareholder may have before him upon the face of the dividend warrant an explanation of the sum that has been deducted, the amount from which it has been deducted, and the rate of the sum which has been deducted for income tax. [His Lordship then read para. 13.] The company had had its profits subjected to tax; and it had paid in the first year, 1927, 13,652*l.* by way of tax and in the next year 15,135*l.*

What is said as to this claim is that in order to arrive at what ought to be deducted from the shareholder, the company was not entitled to take the rough and ready measure of deducting tax at the rate applicable for the year from the gross amount of the dividend paid; but ought to divide out among its shareholders or corporators an aliquot part of the sum that it had paid in income tax, that aliquot part being determined by finding the ratio of the interest held by the shareholder to the total interest of all the corporators together. In this case, as the shareholder held 67,500 shares, and there were 150,000 shares issued, the appellant's quota to be paid by him, would be ascertained by the fraction determined by putting 67,500 over 150,000, and taking that proportion in the two years in question, of 13,652*l.* and 15,135*l.* respectively. The Commissioners held that the appellant was not entitled to alter the sum charged against him or deducted from him. That decision of the Commissioners has been upheld by Rowlatt J., and hence this appeal.

It will be seen that the divergence between the points of view of the taxpayer, the appellant, and the Crown, is that the taxpayer says: "I am only liable to pay a sum which is the appropriate amount to be attributed to me of the sum which has been charged against the company," while the Crown, on the other hand, says: "You have received a certain sum by way of dividend. You have to pay income tax on the amount of that dividend. The company is the hand which is to collect the tax and, therefore, it has rightly deducted from your dividend a sum at the appropriate rate of tax for the year in which it is deducted. Being the collector it will bring into its accounts the sums so deducted against the sums which it, as a taxpayer, has had to pay."

It is a root principle of income tax law, so clear that I do not pause to state the authorities for it, that deductions at the source should be an integral part of the system of the collection of the tax. It has been adopted in respect of a number of payments made by one person to another. A tenant has to pay the tax under Sch. A for his landlord, and the landlord has to allow as a deduction from any rent which becomes due to him immediately after that payment the amount paid by the tenant in respect of that tax.

A number of Income Tax Acts have been codified and in part amended by the Act of 1918, which came into operation pursuant to s. 239 on April 6, 1919. We have, from and after that date, therefore, no longer to consider the terms of s. 54 of the Act of 1842, and it is at once to be noticed that the rule which replaces s. 54 of the Act of 1842 does not use the same words. One assumes, therefore, that some change must be intended by the choice of those different words.

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As I have said, one of the root principles of the system of collecting income tax is that deductions at source should be made; and that is provided for in the General Rules applicable to Schs. A, B, C, D and E. Rule 19 provides that where any yearly interest of money, annuity, or any other annual payment is payable wholly out of profits or gains brought into charge, then no assessment is to be made upon the person entitled to such interest, annuity, or annual payment, but the whole of those profits or gains are to be "assessed and charged with tax on the person liable to the interest, annuity, or annual payment, without distinguishing the same, and the person liable to make such payment"—that is, who has to make the payment to the recipient—"whether out of the profits or gains charged with tax or out of any annual payment liable to deduction . . . . shall be entitled, on making such payment, to deduct and retain thereout a sum representing the amount of the tax thereon at the rate or rates of tax in force during the period through which the said payment was accruing due." That rule is plain enough. It entitles the deductor to retain out of the interest or payment due to the recipient a sum representing the amount of tax thereon, and although he retains that, the recipient is bound to give a discharge for the full amount, as if he had actually received it.

The question of rate of tax, which may be left open by that rule, has now been stabilised by s. 39 of the Finance Act, 1927, which provides that "tax may be deducted or shall be allowed at the standard rate for the year in which the amount payable becomes due." Any difficulties which might arise in regard to the rate of tax to be charged on sums which had accrued due in one year and become payable in another, are thus disposed of by an arbitrary provision that the tax is to be allowed at the standard rate for the year in which the amount payable becomes due.

Rule 21 deals with the case where the moneys paid to the recipient are "not payable, or not wholly payable, out of profits or gains brought into charge." As the deductor is made the collector for the Revenue he can retain the sum deducted where his payment to the recipient is made out of the profits or gains already brought into charge; but where the payment is made out of profits or gains which have not been brought into charge, the deductor has to make a return to the Revenue of the amount so deducted, and every such amount becomes a debt due to the Crown from him.

Intermediately between these two rules is r. 20. Under that rule "The profits or gains to be charged on any body of persons"—a phrase which, by s. 237, includes a "company"—"shall be computed in accordance with the provisions of this Act on the full amount of the same before any dividend thereof is made in respect of any share, right or title thereto." Under that provision income tax has to be paid upon the gross profits of a company before it is allowed to deal with the question of distributing those profits. The rule goes on: "And the body of persons paying such dividend shall be entitled to deduct the tax appropriate thereto." It appears to me that those words really dispose of the point argued in the present case. The company that pays the dividend is entitled to deduct the tax appropriate thereto, that is, appropriate to the dividend; and, inasmuch as the tax is imposed by the Finance Act of the particular year and the liability is for that year, the rate of tax appropriate for that year would be the rate imposed by the Finance Act of that year. It is that Finance Act which makes the Income Tax Act, 1918, operative, and without it the Act of 1918 would be dormant. It is only when by a section of the Finance Act a charge is made in respect of income tax that the Act of 1918 comes into operation. Thus simply construed, it appears that the word "appropriate" has reference to the sum paid by way of dividend, and the rate of tax charged in the particular year by the Finance Act.

It is said, however, that this is not correct; and the argument is founded upon a passage in Lord Phillimore's speech in *Bradbury* v. *English Sewing Cotton Co., Ld.* (1), where he seems to suggest that the Income Tax Act, 1842, "carries the analogy of a partnership further, for it contemplates a company declaring a dividend on the gross gains, and then on the face of the dividend warrant making a proportionate deduction in respect of the duty"; so that the shareholder pays an aliquot part of the sum paid by the company. Reference is also made in support of this argument to a passage in the judgment of Lord Cave, in *Singer* v. *Williams* (2), where he says: "The shareholder in a British company pays by way of deduction a part of the tax paid by the company." It is right to point out with regard to both those passages that they relate to a system of income tax in existence before the Act of 1918 came into force: that is to say, before r. 20 replaced s. 54 of the Act of 1842. It is also right to observe that both those cases are dealing with matters very different from the plain problem which is presented to us, complicated though in its results it would prove to be. We have to interpret r. 20, and I have already suggested an interpretation of these comparatively simple words. I do not find sufficient authority, in either of the passages referred to, culled as they are from speeches made on wholly different subjects, to countervail the plain meaning of the words of r. 20. I do not intend to raise any doubt whether the system in practice before the Act of 1918 came into force was right. But now that the Act of 1918 is in force we have only to construe r. 20 of that Act; and I think it is plain that the interpretation I have suggested is right.

I have already given an indication of what my reading of rr. 19, 20 and 21 is, in *Commissioners of Inland Revenue* v. *Dalgety & Co., Ld.* (3), when I said: "From these rules it is clear that: (*a*) the tax so deducted is the tax that ought to be paid by the person entitled to the interest; (*b*) no assessment is made upon the person entitled to the interest, and that the system of deduction—in other words, payment at the source—is adopted in respect of his liability." That is the liability of the person entitled to and the recipient of the interest. I make it quite plain, I think, that there is a distinction between the company as an entity paying its tax and the shareholder as an entity paying his tax. Later I say (1), after referring to *London County Council* v. *Attorney-General* (2): "These passages make it clear that the tax deducted is paid on quite a different account from that of the deductor—namely, the taxpayer who is entitled to have the interest paid to him; and, further, that the right to retain the tax deducted is one which is given clearly and ought to be enforced in favour of the deductor." That case illustrates that the system is one in which the tax paid by the company and the tax deducted from its shareholders may not be exactly equivalent the one to the other, but that this is the system employed even though at different times it might yield some possible profit to the company. The observations that I made on that occasion were not based upon my own authority alone. The matter had been discussed earlier by Astbury J. in *Rover* v. *South African Breweries* (3), where the question arose whether or not the shareholder was entitled to the relief given to the company by reason of the fact that it had paid some colonial tax. The argument presented there was, contrary to what was ultimately decided, that the dividends were taxable as part of the shareholders' income, that the provision for deducting the tax on the dividends was only machinery for collecting the shareholders' tax at the source, and that the company's tax and the shareholder's tax were two distinct things. That argument did not prevail. The matter had been to some extent discussed in *Ashton Gas Co.* v. *Attorney-General* (4); but *Rover* v. *South African Breweries* (3) came directly under

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(1) [1923] A. C. 744, 770.

(2) [1921] 1 A. C. 41, 50.

(3) [1930] 1 K. B. 1, 25.

(1) [1930] 1 K. B. 28.
(2) [1901] A. C. 26.
(3) [1918] 2 Ch. 233.
(4) [1906] A. C. 10.

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the consideration of the House of Lords in *Scottish Union and National Insurance Co.* v. *New Zealand and Australian Land Co.* (1) It is quite true that the claim in the *Scottish Union* case (1) was that the preference shareholders should share in the advantage which had been enjoyed by the company of a repayment of tax in consequence of their profits having borne a colonial tax. But the question on which the case is now being referred to was relevant, as is shown by the argument presented (2): "The shareholders pay the tax and the company is only the medium of payment. Since the company pays as agent for all the corporators it follows that whatever it recovers in the form of abatement of United Kingdom income tax must be communicated to the same persons." Lord Finlay in his speech said (3): "The sums repaid by the Commissioners go into the assets of the company, and will fall into the dividend payable to the ordinary shareholders, whose dividends would otherwise have been diminished by the whole amount of the disbursements for the Colonial income tax. It is on the ordinary shareholders that the burden of this Colonial tax . . . . falls." Then he cites *Rover* v. *South African Breweries* (4), and holds that that case cannot stand: "But it by no means follows that because such a repayment has been made under s. 43 the case can be dealt with on the assumption that what takes place is equivalent to a reduction of the United Kingdom income tax by the amount returned. The wording of the section shows that this is not what was meant. It is only a person who has paid the United Kingdom income tax that is entitled to apply for the repayment in respect of Colonial taxes which have been paid on the same portion of income. . . . . The company has, in fact, paid the United Kingdom income tax, and it is the company that is entitled to the repayment received." Later he says (5): "I think the decision in *Rover's* case (4) was erroneous. . . . . The decision proceeded simply on the assumption that the repayment had the effect of diminishing pro tanto the United Kingdom income tax." In the same case Lord Cave says (1): "It seems probable that, if the appellant succeeded, the preference shareholders, having borne tax at 3*s.* 6*d.* in the £ only, would be liable to be assessed to tax for the additional 1*s.* 6*d.* in the £, in which case the revenue would get back through those shareholders the whole of the sum paid to the company under s. 43 of the Act."

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(1) [1921] 1 A. C. 172.

(2) Ibid. 175.

(3) [1921] 1 A. C. 182.

(4) [1918] 2 Ch. 233.

(5) [1921] 1 A. C. 184.

In view of the reasoning in *Rover's* case (2), and the decision I have just referred to overruling *Rover's* case (2), and in particular Lord Cave's words, it is plain that the shareholder is to be treated as a separate entity from the company for the payment of tax. The passages I have cited appear to me to make the position plain as between the company and the shareholder. They are two separate and different entities, and the shareholder is not merely paying an aliquot part of the taxation imposed upon the company. Moreover, some time ago it was said in *Inland Revenue Commissioners* v. *Blott* (3) by Lord Cave in a statement (4) which has always been accepted that: "A company paying income tax on its profits does not pay it as agent for its shareholders. It pays as a taxpayer, and if no dividend is declared the shareholders have no direct concern in the payment. If a dividend is declared, the company is entitled to deduct from such dividend a proportionate part of the amount of the tax previously paid by the company; and in that case the payment by the company operates in relief of the shareholder. But no agency, properly so called, is involved."

It is clear, after considering these authorities, that there is no sufficient ground for accepting the view presented in the speech of Lord Phillimore to contradict the plain words of r. 20. I think it is plain that the taxpayer must be treated as a separate entity, the company being treated as a collector, as has been said in one of the cases, for and on behalf of the Crown. In those circumstances, it appears to me that the decision of the Commissioners was right and the decision of Rowlatt J. upholding their decision must be affirmed.

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(1) [1921] 1 A. C. 185.
(2) [1918] 2 Ch. 233.
(3) [1921] 2 A. C. 171.
(4) Ibid. 201.

I desire to say only one word more. It has been suggested that *Gimson's* case (1) supports the view presented by the appellant. I am not sure that this is so. I do not think that the facts of *Gimson's* case (1) make it a relevant authority in the present case. But if and when it does become necessary to consider that case, I should like to take a full opportunity of doing so. At the present time, I do not desire at all to say that I think it either right or wrong. All I say now is that it is irrelevant to the present case.

LAWRENCE L.J. I entirely agree, and have very little to add to the judgment delivered by the Master of the Rolls. Broadly stated the contention on behalf of the appellant is that the company is not entitled to deduct from the dividends paid to the shareholders more than the proper proportion of the income tax which the company has itself actually paid or is liable to pay in respect of the profits or gains which it distributes by way of dividend. The answer to that contention turns, in my judgment, upon the construction of the phrase "entitled to deduct the tax appropriate thereto," at the end of r. 20 of the All Schedules Rules to the Income Tax Act, 1918. In construing that phrase, I think it is important to bear in mind that the Income Tax Act, 1842, was repealed by the Act of 1918, and that r. 20 now takes the place of s. 54 of the Act of 1842. The phraseology has been altered. Under s. 54 of the Act of 1842 it was provided that the shareholder should allow out of dividends a proportionate deduction in respect of the duty charged on the company, whereas under r. 20 the company is entitled or authorized, when paying a dividend, to deduct from that dividend the tax appropriate to that dividend. The language in r. 20 is different, in substance as well as form, from the language of s. 54 of the Act of 1842.

The sole question which arises in this case is, what is the true meaning of the appropriate tax in that rule? The tax

(1) [1930] 2 K. B. 246.

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is to be appropriate to the dividend. If there be any doubt as to the amount on which that tax is to be collected, that doubt is, I think, cleared up by s. 33 of the Finance Act, 1924. That section was not enacted for the purpose of clearing up any doubt under r. 20, but for the purpose of compelling the company to explain, on the face of the dividend warrant, how the net sum payable to the shareholder by way of dividend had been arrived at and what deduction had been made in respect of income tax. That section imposed on the company the duty of telling the shareholder how the sum payable to him was arrived at, and gave the shareholder the means of demonstrating to the Revenue officials the amount deducted for income tax when applying for repayment of any income tax which he was entitled to have repaid. Rule 20, however, left one matter open—namely, whether the income tax which the company was entitled to deduct ought to be calculated at the rate prevailing when the profits out of which the dividend was paid were earned, or at the rate which prevailed at the date when the dividend was paid. That matter has, however, been cleared up by s. 39 of the Finance Act, 1927, which provides in clear terms that the rate at which the company is to calculate the income tax which it is entitled to deduct from the dividend is the rate prevailing at the date when the dividend is paid.

In these circumstances, there is no room for the argument addressed to us, that the appropriate tax is a proportion of the tax which the company itself had paid in respect of the gains and profits out of which the dividend is paid; it seems to me plain that the tax appropriate to the dividend is the tax calculated at the rate prevailing at the date of the payment of the dividend. As my Lord has pointed out, the shareholder is the taxpayer, and the company is the collector of the shareholder's tax.

The appeal therefore fails and ought to be dismissed.

ROMER L.J. I agree. The question that arises on this appeal turns upon the true construction to be placed upon

r. 20 of the General Rules applicable to Schs. A, B, C, D and E of the Income Tax Act, 1918. At first sight, if the language of that rule be narrowly scrutinized, there does seem some foundation for the argument that the annual dividends to which the rule applies are dividends that are paid out of the profits brought into tax by the company. The rule provides: "The profits or gains to be charged on any body of persons shall be computed in accordance with the provisions of this Act on the full amount of the same before any dividend thereof is made." That, if construed strictly, would seem to refer only to the dividends of the profits which are being computed. Then it goes on to say: "And the body of persons paying such dividend shall be entitled to deduct the tax appropriate thereto." If the word "such" be strictly construed again it would appear to refer to a dividend payable out of or paid out of the profits brought into tax. But this rule and s. 54 of the Income Tax Act, 1842 which corresponded to r. 20 of the Act of 1918), have in practice always been treated as referring to all dividends. It has always been assumed, as far as I know, by companies, that all dividends were included in s. 54 of the Act of 1842, and are included in this rule. The same assumption seems to have been made by every judge who has had to consider the operation of the rule or the section. Further it seems to me that the same assumption has been made by the Legislature both in s. 33 of the Finance Act, 1924, and in s. 39, sub-s. 1, of the Finance Act, 1927. In these circumstances, I think, it is quite impossible to treat the rule as applying only to the dividends payable out of profits brought into tax and not as applying to any dividends paid by a company.

That being so, the only question remaining on the appeal is what tax is appropriate to be deducted from a dividend when the company pays it. It is said by the appellant that where a company has paid a tax to the Crown it is not appropriate, indeed it is most inappropriate, that when dividing profits among shareholders it should deduct from the dividends any greater sum than it has paid itself to the Crown in respect of tax on these profits. That argument has frequently been addressed to the Courts—at any rate, it was addressed to the House of Lords in the *Scottish Union* case. (1) In reference to it Lord Cave said this (2): "It was pointed out in the course of argument that such a construction of the statute"—he was there dealing with s. 54 of the Act of 1842, and not with r. 20 of the Act of 1918—"would lead to results which cannot possibly have been intended." Further, it seems to me that there is a fallacy lying at the very root of the argument. It treats the company not as a separate legal entity but as merely being equivalent to the aggregate body of its shareholders, and treats the company when it pays tax to the Crown as paying tax on behalf of its shareholders. It has, however, frequently in recent days been pointed out by the Courts, contrary to the opinion entertained by Astbury J. in the *Rover* case (3), that a company is one taxpayer and that each individual shareholder is another and a separate taxpayer, on whose behalf the company deducts a tax when it pays a dividend, but on whose behalf it is not paying the tax when it pays its own tax to the Crown. If a company should declare a dividend without deducting tax then it seems to me that the shareholder would himself be assessable to tax in respect of the dividend he had received. Lord Halsbury seems to have had no doubt as to that when he was making his speech in the House of Lords in the *Ashton Gas Co.* case (4), and Lord Cave in the *Scottish Union* case (1) stated that that probably was so. If that be so, and the company merely acts as a collector of the tax payable by the taxpayer to the Crown, it is quite obvious that the appropriate tax to be deducted from the dividend is the tax which the taxpayer himself would have to pay if he were assessed directly in respect of that dividend. Before the Finance Act, 1927, it would have been an amount calculated by reference to the rate or rates of tax in force during the year or other period in respect of which the dividend was paid. Since the coming into force of the Finance Act, 1927, it is an amount calculated by reference to the standard rate in force at the time when the dividend becomes payable.

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(1) [1921] 1 A. C. 172.
(2) Ibid. 184.
(3) [1918] 2 Ch. 233.
(4) [1906] A. C. 10.

For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Birkbeck, Julius, Edwards & Co.; Solicitor of Inland Revenue.*

H. C. G.

1931
April 29.

EVERETT AND ANOTHER *v.* SHAND AND OTHERS.

Gaming—Totalisator—Dog-racing—Betting with an Instrument or Article at a Game of Chance—"Betting by way of wagering"—"Game or pretended game of chance"—Vagrant Act Amendment Act, 1873 (36 *&* 37 *Vict. c.* 38), *s.* 3.

The Vagrant Act Amendment Act, 1873, s. 3, provides: "Every person playing or betting by way of wagering in any street, road, highway, or other open and public place, or in any open place to which the public have or are permitted to have access, at or with any table or instrument of gaming, or any coin, card, token, or other article used as an instrument or means of such wagering or gaming, at any game or pretended game of chance, shall be deemed a rogue and vagabond . . . . and as such may be convicted and punished . . . . ":—

Held, that persons betting by means of the contrivance known as a totalisator on a dog-race do not act in contravention of the above section, inasmuch as a dog-race is not in itself a "game or pretended game of chance" within the meaning of the section; and, consequently, where a dog-racing track and a totalisator thereat belonged to a company, the contrivance being worked by its clerks, that charges against the secretary and managing director of the company and some of the clerks, of aiding and assisting persons betting at the track by means of the contrivance on dog-races in contravention of the section, were not maintainable and should be dismissed.

Tollett v. *Thomas* (1871) L. R. 6 Q. B. 514 held overruled.

Attorney-General v. *Luncheon and Sports Club, Ld.* [1929] A. C. 400 applied.

CASE stated by the deputy stipendiary magistrate of Liverpool.

Informations were preferred by Mr. L. D. L. Everett, the chief constable for the city of Liverpool, and Mr. W. E. Glover, the assistant chief constable for the city (hereinafter called "the appellants"), against Mr. James Shand, secretary and managing director of a company called the Electric Hare Greyhound Racing, Ld., occupying land known as the Stanley Track, Liverpool, and against Mr. A. Warne and others who were clerks employed by the company (hereinafter called "the respondents"). The informations charged the respondents severally and respectively :—

First, under the Vagrant Act Amendment Act, 1873, s. 3, (1) that on May 28, 1930, and other days thereafter at the city of Liverpool, they did bet by way of wagering or gaming in a public place to which the public were permitted to have access—namely, the Stanley Track, with an instrument of gaming, to wit, a hand totalisator, at a certain game of chance or pretended game of chance, to wit, a dog-race.

Secondly, under that section and the Summary Jurisdiction Act, 1848, s. 5, that on the same days at the city of Liverpool, each of the respondents did knowingly and wilfully aid and abet and assist the Electric Hare Greyhound Racing, Ld., or certain other persons unknown, to unlawfully play or bet by way of wagering or gaming in an open place to which the public were permitted to have access—namely, the Stanley Track, at or with a table or instrument of gaming, to wit, a totalisator, or with a coin or card or token or other article used as an instrument or means of wagering or gaming at a game of chance, to wit, a dog-race.

The following facts were either proved or admitted : The Electric Hare Greyhound Racing, Ld., occupied land known as the Stanley Track, Liverpool. The first respondent was the secretary and managing director of the company, and the other respondents were clerks employed by the company. Entrance to the track was by a gate which led to the 1*s*. ring to which the public had access. On each side of the ring there was a large wooden structure. Each structure was divided into two by a covered passage, and on each side of the passage there were seven windows, each window being manned by a clerk. The windows on one side of the passage were marked: No. 1, Change; No. 2, Dog No. 1; No. 3, Dog No. 2; No. 4, 1*l.* all dogs; No. 5, Dog No. 3; No. 6, Dog No. 4; No. 7, Dog No. 5. The dog number referred to the number of the dog in the official race card for each race in the day. Of the windows on the other side of the passage, No. 1 was marked "Change" and the other six were marked "Pay out." The structure on the right-hand side was confined to 2*s.* units, and that on the left-hand side to 1*s.* units. At each window a ticket was issued in exchange for the value of the unit. The ticket bore the number of the race, the number of the dog, and the rotation number. At each end of each structure there was a blackboard showing the final units placed and the dividend placed on the winning dog, these blackboards being operated by clerks. There were several notices exhibited stating that the totalisator was placed at the disposal of the public by the company. All the money subscribed by the public on any race was returned to those members of the public who had secured tickets bearing the number of the winning dog, divided to the nearest 3*d.*, less 5 per cent. for expenses. The calculations were made by a member of a firm of chartered accountants. There were several loud speakers round the ring, and at the end of each race the first-named respondent announced the winning dog, time and distance by which it won, and the dividend paid on each totalisator. On May 28, 1930, Sergeant Hinchin of the Liverpool City Police visited the track, and on the second race on that date he secured a 1*s.* ticket on dog No. 3, the units issued in respect of that race making a total of 385 2*s.* units and 122 1*s.* units. Dog No. 4 won that race. The sergeant visited the track on later dates also, and on all the dates on which he was present he saw the totalisator in operation.

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(1) See the headnote.

The informations came before the deputy magistrate on October 23 and November 1, 1930.

No evidence was called on behalf of the respondents, and counsel for the appellants submitted that no offence had been committed by any of the respondents within the intent and meaning of the above mentioned Acts. The contentions on each side before the deputy magistrate were substantially the same as those urged on the hearing of the appeal and reported below.

The deputy stipendiary magistrate was of opinion that, having regard to the decision in *Attorney-General* v. *Luncheon and Sports Club, Ld.* (1) no betting had taken place on the premises, and therefore no offence had been committed by any of the respondents under the section, and he dismissed all the informations.

The question for the Court was whether on the above statement of facts the learned deputy magistrate came to a correct decision in law, and, if not, what should be done in the premises.

Singleton K.C. and *R. C. Essenhigh* for the appellants. The learned deputy stipendiary magistrate was wrong in holding that no offence was committed by the respondents. The proceedings were taken under the Vagrant Act Amendment Act, 1873, s. 3, which provides in substance that every person playing or betting by way of wagering in any public place, at or with any table or instrument of gaming, or any article used as an instrument or means of such wagering or gaming, at any game or pretended game of chance, shall be deemed a rogue and vagabond. Two charges were brought against the respondents, first, that of having themselves committed the offence prohibited by the section; and, secondly, that of having aided, abetted, and assisted the company named in the case or certain other persons in committing the offence. The appellants do not press the appeal against the decision of the deputy stipendiary magistrate in so far as it exonerates the respondents from the first of these charges, because the decision of the House of Lords in *Attorney-General* v. *Luncheon and Sports Club, Ld.* (1), seems to render it very doubtful whether the respondents could be convicted on that charge. It is submitted, however, that the deputy stipendiary magistrate ought to have convicted the respondents on the second charge. If the company, or

(1) [1929] A. C. 400.

the police sergeant, or the other persons who made bets on dog-races by means of this totalisator, committed the offence prohibited by the section, it seems clear that the respondents aided and abetted them in so doing by inviting persons to make bets by that means, by receiving the money paid into the totalisator to be disposed of by them on behalf of the company according to the result of the races, and by using the instrument for the purpose of registering the amount of the money received and the sums to be paid to the winners and as an advertisement of this process of betting on dog-races. The question, therefore, is whether the persons who entered into transactions by means of this machine committed the offence created by the section. There can be no doubt that in what they did every element of the offence was present. They were persons "playing or betting by way of wagering" within the meaning of the section, because by engaging in these transactions they were entering into betting contracts with each other: see *Attorney-General* v. *Luncheon and Sports Club, Ld.* (1), and *Strathern* v. *Scottish Greyhound Racing Co., Ld.* (2) The deputy stipendiary was wrong in holding that no betting took place on the premises of the company. The respondents were also persons playing or betting by way of wagering with an "instrument of gaming, ... or other article used as an instrument or means of such wagering or gaming." Each ticket issued from the totalisator, and each blackboard showing the final units and the dividend in respect of each race, was an "instrument" of gaming, or an "article" used as an instrument of wagering or gaming within the section, and further the totalisator as a whole is an "instrument" or "article" of that description within the section. That the totalisator is an illegal contrivance appears from the fact that it was deemed necessary to introduce into the Racecourse Betting Act, 1928 (18 & 19 Geo. 5, c. 41), a provision—namely, s. 1, sub-s. 2 (*a*), authorizing it in the case of horse-races. That Act, by s. 1, sub-s. 1, applies to horse-races but to no other races, and it does not therefore authorize the use of the totalisator at dog-races. By s. 1, sub-s. 3, the expression "totalisator" means "the contrivance for betting known as the totalisator or pari-mutuel, or any other machine or instrument of betting of a like nature, whether mechanically operated or not." That definition, though expressed to be for the purposes of the Act, shows the statutory conception of a totalisator, and it is applicable to this machine. It is recognized by s. 4, sub-s. 1, of that Act that a bet, whether made by means of a totalisator or not, is a bet by way of wagering or gaming. Finally, in order to constitute the offence under s. 3 of the Act now in question, the betting by means of the instrument must no doubt take place at a "game or pretended game of chance": see *Ridgeway* v. *Farndale.* (1) The deputy stipendiary did not deal with that point. Here the betting by means of the instrument took place at a game or pretended game of chance. A horse-race in itself need not be a game of chance coming within the class of unlawful games: see *Ellesmere* (*Earl*) v. *Wallace* (2), but materials may be introduced into or associated with it which make it a game of chance. In *Tollett* v. *Thomas* (3) the appellants were the owners and operators of a machine called a pari-mutuel by which bets on horse-races were effected between members of the public, the appellants retaining a percentage of the sums deposited and dividing the balance among the backers of the winning horse, and it was there held that the appellants had been rightly convicted of betting at a game of chance. Cockburn C.J. there said: "Whether a horse-race be in itself a game of chance or not, ... if some additional element of chance be introduced, the wagering on a horse-race may be converted into a game of chance." (4) That case applies here. The section under which it was decided—namely, s. 3 of the Vagrant Act Amendment Act, 1868 (repealed), was substantially the same as that now under discussion; the machine there used, though portable, hand-worked, and called a pari-mutuel, was not essentially different from a totalisator, and the horse-race at

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(1) [1929] A. C. 400.

(2) 1930 Sc. L. T. 419.

(1) [1892] 2 Q. B. 309.

(2) [1929] 2 Ch. 1.

(3) (1871) L. R. 6 Q. B. 514.

(4) Ibid. 521.

which the betting there took place is for this purpose the same as a dog-race. Though the dog-race on which the betting here took place may not itself have been a game of chance, elements of chance were introduced into it by reason of the uncertainty as to the number of persons taking part in the proceeding, and as to the sums which they might contribute, and the shifting of the odds in the meantime.

Sir John Simon K.C. and *Wilfrid Clothier* for the respondents. The deputy stipendiary magistrate was right in dismissing the informations, though the ground of his decision may be open to question. As the appellants do not press the appeal on the first charge, it is only necessary to deal with the second charge—namely, that the respondents did aid, abet and assist the company or other persons to bet with an instrument of gaming or with an article used as an instrument of gaming, at a game of chance or pretended game of chance, contrary to s. 3 of the Vagrant Act Amendment Act, 1873. The company, however, did not bet. It did not enter into a contract with anyone to pay a sum of money in consideration of the chance of receiving a larger sum on the occurrence of an uncertain event. It only provided facilities for betting by others in consideration of a percentage of the sums deposited by them. In *Tollett* v. *Thomas* (1) it was wrongly assumed that the appellants there, who were merely the proprietors of the machine by which the betting was conducted, were themselves guilty of illegal betting. The appeal may therefore be further limited to the charge of aiding and abetting the other persons referred to in contravening the section. Even if these other persons did the acts prohibited by the section, the respondents did not aid, abet or assist them in so doing. They did not in any way help them in making any unlawful bet. But, further, these other persons did not do the acts prohibited by the section or any of them. They were not "betting by way of wagering" with any other person within the meaning of the section. In *Attorney-General* v. *Luncheon and Sports Club, Ld.* (2), the rules of the club provided that the members might make bets with each other; but there was no provision here that persons using this machine should by so doing become bound to each other. These other persons did not bet with any "instrument of gaming" or "other article" used as such within the meaning of the section. From the particular terms used in connection with them in the section it is clear that these expressions refer to small portable machines which materially assist persons in the operation of betting, like that which was employed in *Tollett* v. *Thomas.* (1) They do not refer to a contrivance like this totalisator, which is a large construction, not merely mechanical but operated mainly by human agency, and not directly helping persons to make bets. In the Oxford Dictionary the word "totalisator" is defined as "an apparatus for registering and indicating the number of tickets sold to betters on each horse in a race." From that work it also appears that the instrument so designated was recognized as legal by the Australian Parliament in 1879, and it is now recognized in this country for the purposes of horse-racing by the Racecourse Betting Act, 1928. The persons referred to did not bet with any instrument "at any game or pretended game of chance" within the meaning of the section. In order that the offence prohibited by the section may be committed, the betting must take place at a game or pretended game of chance: *Ridgeway* v. *Farndale.* (2) That consideration was not brought to the notice of the deputy stipendiary magistrate. If betting did take place in this case, the only game or pretended game at which it took place was a dog-race, but that is not a game or pretended game of chance: *Ellesmere (Earl)* v. *Wallace.* (3) In the case of *Tollett* v. *Thomas* (1) the Court did not appreciate that the game at which the betting takes place must be a game of chance, apart altogether from the betting itself, and it erroneously held that the horse-race at which the betting took place was converted into a game of chance by the betting upon that race. That case, in having decided that gaming took place

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(1) L. R. 6 Q. B. 514.

(2) [1929] A. C. 400.

(1) L. R. 6 Q. B. 514.

(2) [1892] 2 Q. B. 309.

(3) [1929] 2 Ch. 1.

between the proprietors of the instrument and the persons who resorted to it, is inconsistent with the later decision of the House of Lords in *Attorney-General* v. *Luncheon and Sports Club, Ld.* (1), and it should be treated as overruled for all purposes and no longer followed on any point. If the persons who made use of the totalisator did not contravene the section, the respondents cannot have aided and abetted them in contravening it, and the appeal should be dismissed.

Singleton K.C. in reply. If *Attorney-General* v. *Luncheon and Sports Club, Ld.* (1), did overrule *Tollett* v. *Thomas* (2) to any extent, it only overruled that case in so far as it decided that there was there betting of the kind prohibited by the Act, and it did not overrule the observations of Cockburn C.J. to the effect that a horse-race may be a game of chance.

LORD HEWART C.J. This is a Case stated by the learned deputy stipendiary magistrate for the City of Liverpool. Without reading the Case again I think it is enough to say that he dismissed all the informations against the respondents. He dismissed them because he was of opinion that in view of the decision in *Attorney-General* v. *Luncheon and Sports Club, Ld.* (1), no betting had taken place on the premises. I think that the ground on which he dismissed the informations was wrong. To me it seems clear that betting did take place on the premises. Nevertheless, I think the question for us is whether he may not have been right in holding that the informations should be dismissed. Mr. Singleton no longer lays any stress on the first charge made in the informations. He founds himself only on the second charge, which is that the respondents did aid, abet and assist the company or other persons to contravene s. 3 of the Vagrant Act Amendment Act, 1873. He frankly admits that the only authority in his favour is the decision of this Court sixty years ago in *Tollett* v. *Thomas*. (2) In my opinion the effect of the decision of the House of Lords in *Attorney-General* v. *Luncheon and Sports Club, Ld.* (1),

(1) [1929] A. C. 400.

(2) L. R. 6 Q. B. 514.

was to overrule the decision in *Tollett* v. *Thomas* (1), although, oddly enough, so far as the reports show, that case does not appear to have been mentioned in the later case either in the House of Lords or in the Court of Appeal. In view of the existing state of the decisions I am of opinion that the decision of this Court in *Tollett* v. *Thomas* (1), eminent as were the judges by whom it was given, is no longer binding upon this Court. As regards the second charge in the informations we are therefore remitted to the words of the Statute itself.

Much has been said about the words of s. 3 of the Act of 1873, and I shall not attempt to repeat or even to summarize the arguments which have been advanced as to their meaning. The essence of the section is that there should be betting by way of wagering with an article "at any game or pretended game of chance." I am not going to criticize textually the words which were used in *Tollett* v. *Thomas.* (1) In view of what has taken place, I think that the construction of the section is now open to us, and that, before the Court can find that there was betting by way of wagering in contravention of the section, it is necessary to find that there was a game or pretended game of chance at which it took place. Though the betting by way of wagering or gaming might of itself amount to a game of chance, that is not enough. There must be a game or pretended game of chance at which the betting by way of wagering or gaming takes place. Here there was betting by way of wagering, but, in the absence of any authority to show that a dog-race is in itself a game of chance, it does not appear that that betting took place at any game or pretended game of chance. I therefore think that, though the reasoning of the deputy stipendiary magistrate cannot be supported, the conclusion at which he arrived was correct, and this appeal should be dismissed.

AVORY J. I am of the same opinion. In view of the admission which has been made by Mr. Singleton, the only question which it is now necessary to consider is whether

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(1) L. R. 6 Q. B. 514.

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the respondents, or any of them aided, abetted or assisted any of the persons who were making use of the totalisator on the occasions in question in playing or betting by way of wagering at any game or pretended game of chance within the meaning of s. 3 of the Act of 1873. The deputy magistrate does not appear to have had his mind directed to the question whether these persons were or whether anyone else on the premises was betting or wagering at or on any game or pretended game of chance. He took what appeared to be a short cut by holding that the decision of the House of Lords in *Attorney-General* v. *Luncheon and Sports Club, Ld.* (1), was an authority for the view that no betting had taken place on these premises. As my Lord has said, that view cannot be justified. It may be that there was betting by the persons who used the totalisator on this land inter se; but, unless we are bound by the decision in *Tollett* v. *Thomas* (2), I think it is clear that we must hold that they were not betting or wagering among themselves at any game of chance within the meaning of the section. We have, therefore, to consider whether we are bound by the case of *Tollett* v. *Thomas*. (2) It is clear, and it has been admitted by Mr. Singleton, that that case was decided on the ground that there had been betting by the appellants in that case who were the proprietors of the machine. Although the point was distinctly taken on behalf of the appellants, as appears from the report of the case in the Law Reports (3), that the appellants were not themselves playing or betting, it was never decided. It was merely assumed against the appellants, and Blackburn J., according to an interlocutory observation, seems to have thought that it was enough to say that if the appellants produced the machine for others to play with, they would be "using" it within the meaning of the Act, giving the go-by to the question whether they were actually betting or wagering. As the substratum of the decision in that case has, in my view, been destroyed by the decision of the House of Lords, it seems to me that we are no longer bound by that decision so far as it may have declared that a horse-race may be regarded as a game of chance. Cockburn C.J. did there glance at the question whether wagering on a horse-race could be said to be wagering on a game of chance, but he abstained from deciding it. He said: "Whether a horse-race be in itself a game of chance or not, we can entertain no doubt that, if some additional element of chance be introduced, the wagering on a horse-race may be converted into a game of chance." (1) That does not seem to me to be a decision, or at all events it is not a satisfactory decision, of the question whether betting on a horse-race or a dog-race is betting on a game of chance. In the much later decision of *Ridgeway* v. *Farndale* (2) the essential part of the offence was clearly pointed out by the Court in a case which raised the question in the most appropriate way. It was a case where the conviction omitted the words "at a game or pretended game of chance," and the Court had to decide whether the conviction could stand. Wright J., in the course of his judgment, in which Collins J., as he then was, concurred, said: "The words 'at any game or pretended game of chance' remain a part of the essential definition of the offence." In my opinion there is no evidence here that there was any wagering or betting at any game of chance. Therefore, though the deputy magistrate decided the case on a wrong ground, the dismissal of the charge was in the circumstances proper, and the appeal should be dismissed.

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(1) [1929] A. C. 400.

(2) L. R. 6 Q. B. 514.

(3) L. R. 6 Q. B. 517.

HUMPHREYS J. I agree. I think we are bound to say—and indeed the contrary has not been seriously argued—that the opinion, expressed at the hearing by the deputy stipendiary magistrate, as stated in the Case, that no betting had taken place on the premises, was wrong. It is clear in view of the decision of the House of Lords in *Attorney-General* v. *Luncheon and Sports Club, Ld.* (3), that betting of a sort did take place on these premises. That was the only ground

(1) L. R. 6 Q. B. 521. (2) [1892] 2 Q. B. 309.
(3) [1929] A. C. 400.

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upon which the deputy magistrate gave his decision and dismissed the informations. It appears from the Case that a number of other points were raised before him, among them being that no game of chance was being carried on at this place. The deputy magistrate expressed no view on that point, and I confess to having had some doubt whether the case should not be sent back to him in order that he might have the opportunity of applying his mind to the questions whether it is necessary to the offence that there should be a separate game of chance and whether there was here a game of chance, which seem to be the real questions in the case, but on the whole, as the facts are fully stated in the Case, I agree with the other members of the Court that we are at liberty to say what is our view of the law in regard to these questions. I concur in the view expressed in the judgments which have just been pronounced that the case of *Tollett* v. *Thomas* (1) has been virtually overruled by the House of Lords, and I therefore agree that it is open to us to express our own view as to the construction of s. 3 of the Act of 1873. In my view the section provides that before a person can be convicted thereunder it must be proved that he was playing or betting by way of wagering with some instrument of gaming or other article used as such at a game or pretended game of chance. I think it is impossible to say that the game or pretended game of chance is merely the playing or betting by way of wagering already referred to in the section. I think that in order to commit an offence under this section a person must be found to have been playing or betting by way of wagering at some game or pretended game which is in itself a game of chance. I do not think it can be said that dog-racing, any more than horse-racing, is a game of chance. I therefore agree that this appeal should be dismissed.

LORD HEWART C.J. I should like to add, as the point has been discussed, that in my opinion it is not necessary here to decide whether the structure described in the case was an "instrument of gaming" within the meaning of s. 3 of the Act.

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(1) L. R. 6 Q. B. 514.

Appeal dismissed.

Solicitors for appellants: *F. Venn & Co., for the Town Clerk, Liverpool.*

Solicitors for respondents: *Hatchett Jones & Co., for N. E. Stockdale, Liverpool.*

J. R.

LYONS (J.) AND COMPANY, LIMITED *v.* KEATING.

1931
May 6.

Adulteration—Cream—Artificial Cream—Substance purporting to be Cream—Sale for human Consumption—Description or Designation including the word "cream"—Confectionery—Composite Substance in Connection with Confectionery—Substance purporting to contain Cream—Artificial Cream Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 32), *s.* 1, *sub-s.* 1; *s.* 6.

By s. 1, sub-s. 1, of the Artificial Cream Act, 1929: "No person shall sell or offer or expose for sale for human consumption under a description or designation including the word 'cream' any substance purporting to be cream or artificial cream as defined in this Act unless—

(*a*) The substance is cream as defined in this Act. . . . ."

The appellants were convicted on informations preferred against them under the Artificial Cream Act, 1929, in respect of the sale by them of certain confectionery, described as "cream filled Swiss rolls" and "vanilla cream sandwich," containing a cream-like paste or substance, which was not cream as defined in the Artificial Cream Act, 1929:—

Held, that the Artificial Cream Act, 1929, applies only to the sale of cream or artificial cream as a separate article of food, and has no application to confectionery or to a composite substance in connection with confectionery. It applies only to a substance purporting to be cream and not to a substance purporting to contain cream.

CASE stated by Swindon justices.

The appellants, J. Lyons & Co., Ld., were charged in and by an information preferred against them by the respondent, Charles Keating, an inspector of the Wilts County Council, the Food and Drugs Authority charged with the enforcement of the Artificial Cream Act, 1929, for selling to Walter James Bedwin, for human consumption, under a description or designation including the word "cream," a substance purporting to be cream as defined in s. 6 of the Artificial Cream Act, 1929, which substance was not cream as so defined, contrary to s. 1, sub-s. 1, of that Act. (1)

The sale to Bedwin was made on July 26, 1930. The article sold was an article of food, and was sold in a package labelled "Lyons" Swiss Rolls, "Chocolate Sponge (Cream Filled), 1*s.*" The invoice described it as "Crm. Fld. Sw. Rolls" (meaning Cream Filled Swiss Rolls). The article consisted of chocolate sponge roll lined with approximately 30 per cent. of a cream-like paste made of a mixture of sugar and emulsified fat (a vegetable oil) not derived from cream or milk. The cream-like paste was wholesome.

The appellants were similarly charged in and by a second information preferred by the respondent in respect of a sale to George Raven.

The sale to Raven was made on August 1, 1930. The article was an article of food, and was sold in a package labelled "Lyons' Cream Sandwich (Vanilla Filled), 1*s.*" The invoice described it as "Van. Crm. Sand." (meaning Vanilla Cream Sandwich). The words "Cream" and "Sandwich" on the package were in half-inch letters, and the words "Vanilla Filled" were in much smaller letters. The article in this case consisted of a sponge cake sandwich containing a thin layer, amounting to approximately 6 per cent. of the whole sandwich, of a cream-like substance, which consisted of an emulsion of fat (a vegetable oil) not derived from cream or milk. The cream-like substance was wholesome.

During the last thirty or forty years sales of similar goods by using the word "cream," as applied to cakes and confectionery, had been the practice of the bakery trade. It was contended on the part of the appellants that the Artificial Cream Act, 1929, had reference only to the sale of cream as a separate article of food, and had no application to confectionery or to a composite substance in connection with confectionery, and that when the appellants were selling confectionery under a description which included "cream," they did not sell a substance purporting to be dairy cream. On behalf of the respondent it was contended that the articles of food and sales came within the meaning of the Artificial Cream Act, 1929.

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(1) The Artificial Cream Act, 1929, s. 1, provides: "(1.) No person shall sell or offer or expose for sale for human consumption under a description or designation including the word 'cream' any substance purporting to be cream or artificial cream as defined in this Act unless—(*a*) the substance is cream as defined in this Act. . . ." Sect. 6: "In this Act . . . . 'Cream' means that portion of natural milk rich in milk fat which has been separated by skimming or otherwise."

The justices were of the opinion that the appellants sold the articles as containing cream, and that the articles did not contain cream, and the justices convicted the appellants and adjudged them to pay a fine of 2*l.* and 8*l.* costs in respect of each of the two informations.

The case first came before the Divisional Court on February 6, 1931, when it was remitted to the justices to find whether the articles sold by the appellants were sold by them as substances purporting to be cream, as defined in the Artificial Cream Act, 1929. After a further hearing before the justices on March 6, at which additional evidence was called, the justices found that the articles the subject of the informations were sold as substances purporting to be cream, as defined in s. 6 of the Artificial Cream Act, 1929 (1), and they were of the opinion that there was evidence to support such a finding.

J. Lyons & Co., Ld., appealed.

Sir John Simon K.C., *Roland Oliver K.C.* and *Cyril Salmon* for the appellants. This appeal raises an important question under the Artificial Cream Act, 1929. The appellants were convicted in respect of the sale for human consumption of two articles of food consisting of confectionery, contrary to the provisions of sub-s. 1 of s. 1 of that Act. That Act was passed to regulate the sale and manufacture of artificial cream. The purpose of the Act of 1929 differs from that of the Sale of Food and Drugs Acts. The articles of food in question in this case are not within the ambit of the Artificial Cream Act, 1929. "Cream" is defined in s. 6 of that Act as that "portion of natural milk rich in milk fat which has been separated by skimming or otherwise." The primary purpose of the Act is to secure that something which purports to be cream is not artificial cream. If a substance is sold for human consumption under the name of cream, it must be the pure cream of milk and not artificial cream. The Act only applies to the sale of cream simpliciter for human consumption. The prohibition of the Act refers to the sale of cream as a separate article of food. The Act does not deal at all with the sale of confections, the trade name or description of which contains the word "cream." The real test is that the substance sold must be something which purports to be cream and not a composite confection containing cream.

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(1) See note (1) ante, p. 536.

G. D. Roberts and *Elam* for the respondent. It is not suggested that the sale of an article dissimilar to cream would be the sale of an article purporting to be cream. The question in this case resolves itself into one of fact. The justices have found as a fact that the articles in question contained a substance purporting to be cream, which was not cream as defined in s. 6 of the Artificial Cream Act, 1929. Parts of the articles purported to be cream. The cream preserved its identity. There was evidence to support the finding of the justices, and the Court will not interfere with the convictions.

Sub-s. 1 of s. 1 of the Act of 1929 contains the words: "under a description or designation including the word 'cream.'" The word "including" was inserted in the sub-section for some purpose, and some meaning must be given to it. The justices were right, and their decision should be affirmed.

LORD HEWART C.J. I have come to the conclusion that this appeal against the conviction ought to be allowed. When I look at the title and at the sections of the Artificial Cream Act, 1929, I think it is tolerably plain that what the Act is dealing with is the sale of cream, or artificial cream, simpliciter. The words of sub-s. 1 of s. 1 are: "No person shall sell or offer or expose for sale for human consumption under a description or designation including the word 'cream' any substance purporting to be cream or artificial cream as defined in this Act unless"—certain conditions are fulfilled. No doubt those words, "under a description or designation including the word 'cream,'" lend colour to the very forcible argument that Mr. Roberts has addressed to us on behalf of the respondent; but what is being considered in the section is a substance purporting to be cream or artificial cream, and looking at the rest of the Act I think it is quite clear that the Act is limited to the sale of cream or artificial cream as such. It must be a substance purporting to be cream, and not a substance purporting to contain cream. If the Legislature had intended to mean the latter, it would have been so easy to insert the words: "Any substance or article purporting to be or to contain cream." I think that what the Act really does is to make a sharp contrast between cream, that is, real cream—"that portion of natural milk rich in milk fat which has been separated by skimming or otherwise"—and artificial cream. Whether that is what the Legislature intended to express I do not know, but that, I think, is what the Legislature has said. It may be extremely unfortunate, and it may be, in various cases, exceedingly misleading, that the word "cream" should be used with reference to articles of food of a composite nature, when that which looks like cream is not cream at all. But we have to consider not what this Act of Parliament might have been, but what it is, and the gaps in it can be filled up only by the Legislature and not by this Court.

Personally I can imagine nothing more misleading than the kind of description employed here, but I do not think it comes within the prohibition of the Act. I think, therefore, that this appeal should be allowed.

AVORY J. I am of the same opinion. I have nothing to add to the main ground on which my Lord has proceeded. I desire only to add one word on the further point taken by the magistrates on the case which was remitted to them, and

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my only reason for doing so is that, having been a member of the Court on the former occasion, I am able to say that the only reason why the case was remitted to them was that they did not appear to have addressed their minds to the real question—namely, whether what was sold in this case really purported to be cream within the meaning of this Act. Having now addressed their minds to that question, they do find as a fact that the articles, the subject of the informations, were sold as substances purporting to be cream as defined by the Artificial Cream Act, 1929. I think there was no evidence upon which they could find that these substances or these articles were sold as substances purporting to be cream. Therefore, that finding must be disregarded.

I agree, for the reasons given, that the appeal should be allowed.

CHARLES J. I agree, and have nothing to add.

Appeal allowed.

Solicitors for the appellants: *Bartlett & Gluckstein.*

Solicitors for the respondents: *Calder Woods & Sandiford, for Wansbroughs, Robinson, Tayler & Taylor, Bristol.*

T. W. M.

CHARVONIA *v.* ESTERMAN.

1931
June 10, 11.

Landlord and Tenant—Rent Restriction—Possession—Part of House sub-let by Tenant of Whole House—Sub-letting after July 31, 1923*—Notice to Quit —Tenant not entitled to Possession—Rent and Mortgage Interest Restrictions Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 2, *sub-s.* 1.

By the Rent and Mortage Interest Restrictions Act, 1923, s. 2, sub-s. 1: "Where the landlord of a dwelling-house to which the principal Act [the Act of 1920] applies is in possession of the whole of the dwelling-house at the passing of this Act [July 31, 1923], or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house: Provided that, where part of a dwelling-house to which the principal Act applies is lawfully sub-let, and the part so sub-let is also a dwelling-house to which the principal Act applies, the principal Act shall not cease to apply to the part so sub-let by reason of the tenant being in or coming into possession of that part, and, if the landlord is in, or comes into possession of, any part not so sub-let, the principal Act shall cease to apply to that part, notwithstanding that a sub-tenant continues in, or retains, possession of any other part by virtue of the principal Act."

The plaintiff, the tenant of the whole of a dwelling-house to which the Rent Restriction Acts applied, was in possession of the whole of the house on July 31, 1923. In 1928 he sub-let three rooms in the house to the defendant at a rent which brought them within the Rent Restriction Acts. In 1930 he gave the defendant notice to quit the three rooms, but the defendant refused to do so, contending that he was entitled to the protection of the Rent Restriction Acts. In an action brought by the plaintiff against the defendant for possession of the rooms:—

Held, that there was nothing in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, to prevent the application of its principles to the sub-letting, after the date of its passing, of part of a house as a separate dwelling; that the plaintiff was not the "landlord" of the three rooms within the meaning of s. 2, sub-s. 1, of the Act of 1923 so that the Act of 1920 did not apply to them owing to the fact that he was in possession of them on July 31, 1923; but that the case fell within the proviso to s. 2, sub-s. 1, of the Act of 1923 and the plaintiff was not, therefore, entitled to an order for possession.

Appeal from Shoreditch County Court.

In 1918 the plaintiff, Myer Charvonia, became tenant of the whole of a dwelling-house known as 48, Pellerin Road, Stoke Newington, London, N., to which the Rent Restriction Acts applied. In 1926 he sub-let two rooms in the house to a sub-tenant. In 1928 he resumed possession of those two rooms, and in the same year he sub-let them and a third room in the house to the defendant, Theodore Esterman, at a rent of 1*l.* 0*s.* 9*d.* a week, which brought them within s. 12, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. In 1930 the plaintiff gave the defendant notice to quit which expired on June 14, 1930, but the defendant refused to leave the rooms, contending that he was entitled to the protection of the Rent Restriction Acts. The plaintiff took proceedings in the county court to recover possession of the three rooms, but the county court judge held that the rooms constituted a dwelling-house to which the Rent Restriction Acts applied, and he refused an order for possession. The plaintiff appealed.

B. L. A. O'Malley for plaintiff. The defendant is not entitled to the protection of the Rent Restriction Acts. The plaintiff, although himself the tenant of the landlord of the house, is, as regards the defendant, the landlord of the three rooms occupied by the defendant: *Oakley* v. *Wilson.* (1) The plaintiff was in possession of the three rooms at the passing of the Rent and Mortgage Interest Restrictions Act, 1923, and, therefore, by s. 2, sub-s. 1, of that Act, the Act of 1920 ceased to apply to them. The first proviso to s. 2, sub-s. 1, applies only where the part of the dwelling-house which is sub-let is a dwelling-house to which the Act of 1920 applies and, therefore, the proviso does not apply to the present case. *Domendietti* v. *Ryan* (2) is distinguishable.

Murly-Gotto for defendant. The defendant is in possession of a dwelling-house to which, prima facie, the Act of 1920 applies. Accordingly, he cannot be dispossessed of that dwelling-house except on one of the grounds specified in the Acts. He comes within none of those grounds, but, on the other hand, he falls exactly within the protection afforded by the proviso to s. 2, sub-s. 1, of the Act of 1923: *Doulin* v. *Parcell* (3); *Domendietti* v. *Ryan.* (2)

(1) [1927] 2 K. B. 279.

(2) (1929) 141 L. T. 239.

(3) (1926) 43 Times L. R. 140.

SWIFT J. The question which we have to decide is whether the contention put forward by the plaintiff—namely, that the three rooms occupied by the defendant do not constitute a dwelling-house within the Rent Restriction Acts because that dwelling-house only came into existence, as a dwelling-house, after the passing of the Act of 1923—is correct. I thought at one time that there was great force in that argument, but I was then under the erroneous impression that after the passing of the Act of 1920 no new control could be created, and that, if a new tenancy came into existence after 1920, it could not be controlled under the Act. On consideration, however, it seems to me that that view is wrong. Sect. 12, sub-s. 9, of the Act of 1920 provides: "This Act shall not apply to a dwelling-house erected after or in course of erection on April 2, 1919, or to any dwelling-house which has been since that date or was at that date being bona fide reconstructed by way of conversion into two or more separate and self-contained flats or tenements. . . . ." But that sub-section only applies to houses which were erected after, or were in course of erection on, April 2, 1919, or to houses which were at that time being converted into flats or were so converted thereafter. I can find nothing in the Act of 1920 to prevent the application of its principles to the subsequent letting of part of a house as a separate dwelling. It may well have been the intention of the Legislature, while relieving from restriction persons who built new houses or converted old houses into something quite different, to leave subject to the restrictions of the Act of 1920 the letting of a part of a house as a separate dwelling-house.

If that view be right, the Act of 1920 applies to the letting, in 1928, of these three rooms as a separate dwelling-house unless the plaintiff can crave in aid the provisions of the Act of 1923. It is to be noted that s. 2, sub-s. 1, of that Act applies to the landlord of a whole house being in or coming into possession of the whole of the house which, up till then, has been let to a tenant. From the moment the landlord is in that position the Act of 1920 ceases to apply to the house.

To succeed, the plaintiff must bring himself within that sub-section. In my view he utterly fails to do so. He is not the landlord of the whole house and he never has been. He never was in possession of the whole of the house or of the three rooms sub-let to the defendant as the landlord of the whole of the house. He held the house and the three rooms as a tenant and, as a tenant, he sub-let the rooms to the defendant. If the sub-tenancy were determined, he would again become the occupier of the rooms, but as a tenant of the whole house and not as the landlord.

But that is not all. In the proviso to s. 2, sub-s. 1, of the Act of 1923 the Legislature make it plain that a person in the position of the plaintiff cannot have the benefit of the sub-section. In the present case part of a dwelling-house to which the Act of 1920 applies is lawfully sub-let, and the part sub-let is also a dwelling-house to which the Act applies. Therefore, according to the proviso, the Act of 1920 "shall not cease to apply to the part so sub-let by reason of the tenant"—that is, the plaintiff—"being in or coming into possession of that part." Even if it could be argued that the plaintiff, as regards his sub-tenant, could be described as a landlord—and I am satisfied that he could not be so described for the purposes of s. 2, sub-s. 1, of the Act of 1923—the proviso is aimed at this very class of case.

There is nothing in the Act of 1923 to prevent the Act of 1920 applying to a sub-tenancy created by a tenant, whenever it is created, and, in my opinion, this appeal should be dismissed.

CHARLES J. I agree. With regard to the meaning of the word "landlord" in s. 2, sub-s. 1, of the Act of 1923, I should like to mention that Talbot J., in *Catto* v. *Curry* (1), pointed out that, if the Legislature had omitted the proviso to the sub-section, some valid argument might have been advanced that "landlord" included "landlord tenant." But the proviso was added. Talbot J. said: "The Legislature, however, to guard against the consequence that, as between

(1) [1926] 1 K. B. 460, 464.

tenant and sub-tenant, the Act should not apply while it remained in force between the head landlord and the tenant, inserted the proviso to s. 2, sub-s. 1, to deal expressly with the sub-letting of part of a dwelling-house. In the proviso the word 'tenant' is used in distinction to the word 'landlord,' and its plain and unambiguous meaning is that the provisions contained in the first part of the sub-section are not to apply and that the Act of 1920 is not to cease to be of effect in the case expressly described by the proviso—namely, where the tenant, as distinct from the landlord, comes into possession of part of a dwelling-house which has been sub-let." It appears to me that the facts of this case bring it exactly within the proviso. I, therefore, agree that the premises occupied by the defendant are still within the Act of 1920 and that this appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Scott Duckers & Co.*
Solicitors for defendant: *H. B. Wedlake, Saint & Co.*

G. F. L. B.

applied. HARRISON *v.* HOPKINS. [1949] 2 All E.R. 597.

LEIGH [1950] 2 K. B. 305

Distinguished. LANGFORD PROPERTY CO., LTD. *v.* ATHANASSOGLOU. [1948] 2 All E.R. 722.

Considered. LANGFORD *v.* TUREMAN. [1949] 1 K. B. 29

Followed. HARRISON *v.* HOPKINS [1950] 1 K. B. 124

SKINNER *v.* GEARY.

K. B. D.
1931
April 27.
C. A.
July 15, 16.

Landlord and Tenant—Rent Restriction—Possession—Tenant not residing at Premises—No Evidence of Intention to return—Relative of Tenant permitted to occupy Premises—Rent and Mortgage Interest Restrictions Act, 1923 (13 & 14 *Geo.* 5, *c.* 32), *s.* 4.

For a considerable period before 1919 the defendant was tenant and occupier of a dwelling-house at N., which came within the Rent Restriction Acts. In 1919 he went to live at a house in another locality of which house his wife was tenant. By permission of the defendant, a sister of his wife, with her husband, then went to reside in the house at N. In May, 1930, notice to quit the premises at N. was served by the plaintiff, the landlord, on the defendant, who thereby became statutory tenant of the premises. In June, 1930, the defendant's sister-in-law left the premises, and the defendant permitted his sister to live in them. In an action brought by the plaintiff against the defendant for possession of the house, the county court judge found that the defendant was not in actual occupation of the house at the material time and that he did not retain possession within the meaning of the Rent Restriction Acts by the occupation of his wife's or his own relations, since the purpose of that occupation was not to preserve the house as a residence for himself. The county court judge accordingly made an order for possession of the house, and this order was affirmed by the Divisional Court. On appeal:—

Held, that the appeal should be dismissed on the ground (per Scrutton and Slesser L.JJ.) that the fundamental principle of the Rent Restriction Acts being to protect a tenant who is residing in a house, a tenant, to be entitled to the protection of the Acts, must be in personal occupation or actual possession of the premises in respect of which he seeks that protection, and (per Greer L.J.) that the findings of the county court judge involved that the defendant had sub-let the house and so was, by virtue of s. 4 (*h*) of the Rent and Mortgage Interest Restrictions Act, 1923, precluded from claiming to retain possession.

Dicta of Scrutton and Romer L.JJ. in *Haskins* v. *Lewis* p. 1 *ante* applied.

Per Scrutton L.J.: *Collis* v. *Flower* [1921] 1 K. B. 409 and *Kreitman* v. *Vidofsky* (1927) 43 Times L. R. 335 were wrongly decided; *Mellows* v. *Low* [1923] 1 K. B. 522 distinguished.

APPEAL from Croydon County Court.

The plaintiff, Mrs. Alice Mary Skinner, claimed from the defendant, Edward Geary, possession of a dwelling-house and premises known as 26 Oxford Road, Upper Norwood, London, of which premises the defendant was weekly tenant at 10*s.* a week. It was admitted that the premises came within the scope of the Rent Restriction Acts, and that on May 6, 1930, due notice to quit had been served on the defendant, who had thereby become a statutory tenant. The defendant denied that the plaintiff was entitled to possession of the premises, pleading that he was entitled to retain possession thereof by virtue of the Rent and Mortgage Interest (Restrictions) Acts, 1920 to 1925.

For a considerable period before 1919 the defendant had been the tenant and occupier of the premises. In 1919 he went to live at a house at Tatsfield, Surrey, of which his wife was the tenant. A married sister of the defendant's wife with her husband then resided at 26 Oxford Road until June, 1930, when she left, and a sister of the defendant went to live in the house. She was residing there when proceedings were begun in the county court.

The county court judge found that the defendant was not in actual possession of the premises at the material time—namely, at the time the notice to quit was given—and that he did not retain possession within the meaning of the Rent Restriction Acts by the occupation of his wife's or his own relatives, since the purpose of that occupation was not to preserve the house as a residence for the defendant. The county court judge accordingly made an order for possession of the premises.

The defendant appealed on the ground that the county court judge was wrong in law in holding that the defendant was not entitled to the protection of the Rent Restriction Acts.

Safford for defendant. The county court judge was wrong. For a tenant to be entitled to the protection of the Rent Restriction Acts it is not necessary that he should be in actual physical possession of the premises. When in s. 2, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1923, it was thought necessary, for a specified purpose, that "possession" should mean "actual possession," s. 2, sub-s. 3, was introduced into the Act specially to define it, and that meaning must be limited to the use of the word in s. 2 of that Act. Moreover, in *Collis* v. *Flower* (1) and *Mellows* v. *Low* (2) the executor and the administratrix of deceased tenants were held to be tenants of the respective premises, so as to be entitled to the protection of the Rent Restriction Acts, although they had never resided at the premises. In *Hicks* v. *Scarsdale Brewery Co.* (3) there was a difference of opinion, Swift J. expressing the view that "possession" meant "actual possession" and Acton J. saying that that involved reading into the Acts words which were not there. *Kreitman* v. *Vidofsky* (4), however, where the facts, in every material particular, were the same as those of the present case, is a direct authority in favour of the defendant, the Court there holding that a tenant who had ceased to reside at premises himself, but had allowed his relations to live there in his stead, had not lost the protection afforded him by the Rent Restriction Acts. It is true that in *Haskins* v. *Lewis* (5) Scrutton L.J. said that the fundamental principle of the Rent Restriction Acts was "to protect a resident in a dwelling-house, not to protect a person who is not a resident in a dwelling-house," but those words must be read with those that follow them, "but is making money by sub-letting it," and they must be taken to refer exclusively to cases of sub-letting. Here there was no sub-letting. The inference to be drawn from the provision in s. 5, sub-s. 1 (*h*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as re-enacted in s. 4 of the Act of 1923, that an order for the possession of premises may be made where the tenant has sub-let them without the consent of the landlord, is that, in the absence of unauthorized sub-letting, no order for possession can be made, unless on some other ground, even against an absentee tenant.

[He also referred to *West Wales Joint Board for the Mentally Defective* v. *Evans*. (6)]

Norman Parkes (*Frank J. Powell* with him) for plaintiff. The fundamental principle of the Rent Restriction Acts is not only to "protect a resident in a dwelling-house." It is also the intention of the Acts that houses shall be available for the occupation of persons who need them. It is impossible that the Legislature intended that a tenant should be allowed to go away and leave a house empty, but still retain possession of it for the purposes of the Rent Restriction Acts, and there is no difference in principle if, instead of leaving the house, he lets some one else live in it. Nor does the provision in s. 5, sub-s. 1 (*h*), of the Act of 1920, as re-enacted in s. 4 of the Act of 1923, relating to sub-letting, affect the general principle. That paragraph merely provides an additional specific ground on which an order for possession can be made, and it was introduced by the Act of 1923 really for quieting "doubts which may previously have existed on the subject": per Romer L.J. in *Haskins* v. *Lewis*. (1) *Haskins* v. *Lewis* (1) shows that the true effect of the Acts has always been that relinquishment of premises by a tenant, whether by sub-letting or otherwise, deprives him of the protection of the Acts, and that the provision with regard to sub-letting just referred to made no difference to the position. *Kreitman* v. *Vidofsky* (2) is distinguishable. There is a difference between a tenant permitting another person to live temporarily at the premises—the tenant always having an intention to return, as in *Leslie* v. *Cumming* (3)—and an abandonment of the tenancy. In *Kreitman* v. *Vidofsky* (2) there was no finding that the tenant had abandoned his interest in the premises, and the decision depended on the particular facts. In the present case there is a finding that the defendant relinquished his tenancy. The foregoing submissions find support in the provisions of the Acts. Sect. 5, sub-s. 1 (*b*), of the Act of 1920, as re-enacted in s. 4 of the Act of 1923, refers to certain conduct of "the tenant or any person residing or lodging with him or being his sub-tenant," and clearly does not contemplate occupation by a mere licensee. The same principle is the foundation of para. (*d*) of the same sub-section. A further example is the definition of "tenant" given by s. 12, sub-s. 1 (*g*), of the Act of 1920, where the expression "tenant" is extended to include only persons who have resided at the premises with the tenant and not there during his absence. *Collis* v. *Flower* (1) and *Mellows* v. *Low* (2) were decided solely on the provision in s. 12, sub-s. 1 (*f*), of the Act of 1920, that "tenant" included "any person deriving title under the original tenant."

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(1) [1921] 1 K. B. 409.
(2) [1923] 1 K. B. 522.
(3) [1924] W. N. 189.
(4) 43 Times L. R. 335.
(5) Ante p. 1.
(6) (1928) 44 Times L. R. 565.

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(1) Ante p. 1.
(2) 43 Times L. R. 335.
(3) [1926] 2 K. B. 417.

Safford, in reply, referred to *Campbell* v. *Lill* (3) and *Flint* v. *Ead.* (4)

TALBOT J. The question which we are asked to decide is a very important one—namely, whether a man who in every other respect is the tenant of premises is entitled to the protection of the Rent Restriction Acts if he does not reside at the premises himself. It is obvious that it would be impossible to say that, because a man goes away for reasons of either business or pleasure, for a day or a week or even a few months, intending to come back, he ceases to reside at the premises. But this is a case of a man who does not reside at the premises, who has not resided there for a considerable time, and on whose absence from the premises there is no limit in point of time, either express or to be collected from the circumstances.

It is said that the whole scheme of the Acts is to afford protection to those who actually live in houses which fall within the scope of the Acts. We have been referred to several cases, and they indicate that different views of this matter have been taken at different times by different Courts. In *Collis* v. *Flower* (1) the tenant of a house which was within the Rent Restriction Acts had died, and the defendants in an action for possession by the landlord were the executor of the tenant, who had never lived in the house, and the residuary legatee who had lived in the house previously and continued to live there on sufferance under some arrangement with the executor. The question was raised whether, as the

(1) [1921] 1 K. B. 409.
(2) [1923] 1 K. B. 522.
(3) [1926] W. N. 139.
(4) [1921] W. N. 182.

executor was not in occupation of the house, he could claim the protection of the Acts. The Court held that the executor was a tenant within the meaning of the Acts, who could claim the protection of the Acts, although he was not in occupation. That case undoubtedly decided that the mere fact that the tenant was not in occupation of the house was not sufficient to deprive him of the protection of the Acts. Rowlatt J. said (1): "The tenant can only be Flower as executor, or, possibly, Miss Offen, not as residuary legatee, but as a mere tenant at will under Flower. Some one must have been tenant of the property having regard to the fact that the term 'tenant' in the Rent Restriction Acts includes any person deriving title under the original tenant, and Flower and Miss Offen had all Miss Campbell's [the testatrix] interest. Therefore, one or other of them was tenant. The county court judge has held that Miss Offen was not, and I am not prepared to quarrel with that. With regard to Flower, however, the county court judge has held that he was not tenant, because, in his view, the Acts only apply to a tenant who is in occupation. I do not agree. In this case, on the view of the facts that I am assuming, Miss Offen was in occupation as representing Flower, and while it may be that the Acts cannot be invoked to protect the financial position of a mesne lessor, Flower really is the tenant if Miss Offen is not." That undoubtedly is an authority in favour of the defendant in the present case, because the judge expresses the clear opinion that the decision of the county court judge that the Acts only applied to a tenant in occupation was not sound. McCardie J. agreed with the view expressed by Rowlatt J.

Very much the same was *Mellows* v. *Low* (2), where the weekly tenant of a house had died intestate and the landlord claimed possession from the administratrix of the tenant. The administratrix had never resided in the house. The landlord claimed that the tenancy had lapsed, and that he was entitled to possession. The Court discussed the definition of "tenant" in s. 12, sub-s. 1 (*f*), of the Act of 1920, which,

(1) [1921] 1 K. B. 411.

(2) [1923] 1 K. B. 522.

it is provided, shall include "any person from time to time deriving title under the original . . . . tenant. . . . ." It was held that the administratrix was a tenant within the Acts, Bailhache J. saying that the case was really covered by *Collis* v. *Flower*. (1)

The next case was *Hicks* v. *Scarsdale Brewery Co.* (2), in which Swift and Acton JJ. differed. The plaintiff was the freeholder of certain premises of which the brewery company were the tenants. The company had sub-let the premises, which they never occupied. It was admitted that the sub-tenancy was protected by the Acts and it was contended that, as the premises constituted a dwelling-house to which the Acts applied, no order for possession could be made against the company. Against that it was argued that the company was not entitled to protection, as they were not in occupation of the premises. Swift J. held that, to be entitled to the protection of the Acts, a tenant must be in "actual possession." It has been argued in the present case that where "possession" means "actual possession" Parliament, in s. 2, sub-s. 3, of the Act of 1923, has thought it necessary to insure that that meaning shall be given to it by express definition, the implication being that, in the absence of that definition, the word does not bear that meaning. Acton J., on the other hand, held that to say that the Act applied to protect only people in actual physical possession of premises was to read words into the Act which it did not contain. The matter, therefore, was so doubtful that those two judges took a diametrically opposite view of it.

Between *Kreitman* v. *Vidofsky* (3) and the present case, I can see no distinction which is really sound. The defendant there had originally occupied part of the house as business premises and the two upper floors as a residence. Some years before the proceedings he left the two upper floors and ceased to occupy any part of the premises for residential purposes. In his place he brought his father, mother and brother into the two upper floors, which they occupied rent free. The decision was one partly of fact and partly of law. It was a decision of fact that the father, mother and brother were there not under any tenancy or by anything other than the permission of the defendant. The county court judge then held that, although the defendant had for some years not resided on the premises at all, but had brought his father, mother and brother to reside there without any limitation of time or apparent intention on his own part to return, the defendant was still protected by the Acts. On appeal, the Divisional Court decided that it could not be shown on the facts that the county court judge had arrived at an erroneous conclusion in law and the appeal must be dismissed.

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(1) [1921] 1 K. B. 409.

(2) [1924] W. N. 189.

(3) 43 Times L. R. 335.

The only other case to which I need refer is *Haskins* v. *Lewis.* (1) The facts are rather different in that case, but we have a deliberate expression of opinion by two members of the Court of Appeal with regard to the principle to be applied to the consideration of the present point. The facts were that part of premises which were within the Rent Restriction Acts were used as business premises by members of the tenant's family and that the tenant, who resided elsewhere, sub-let the rest of the premises. The landlord applied in the county court for an order for the possession of the whole of the premises. The county court judge granted the order, holding that part of the premises were used for business purposes and that the tenant, in sub-letting the remainder of the premises, had parted with possession of them. Those facts differ from the facts of the present case. There there was a sub-tenancy. Here there is none, and that may have many consequences. But two of the judges appear to have based their decision on grounds of broad principle which, in their opinion, were decisive of that case and which, in my opinion, are decisive of the present. The Court of Appeal held that an order could be made for the recovery by the landlord of possession of the whole of the premises, notwithstanding that the basement and second floor had been sub-let as residences to sub-tenants who would

(1) Ante p. 1.

still be protected and would become tenants of the landlord. In giving judgment, Scrutton L.J. said (1): "The next step . . . . is as to the position of the two dwelling-houses, the basement and the attic, which are occupied by sub-tenants. One thing is quite certain, the original tenant is not residing in those floors; his sub-tenants are residing there. The consequence is that you have this position, that the original tenant is not occupying any part of the original tenancy, the original dwelling-house, so as to make him a tenant under the Act; he is not occupying the ground floor and the first floor as a residence, he is occupying them for business purposes; he is not occupying the attic and the basement as a residence, those portions of the house are being occupied by the sub-tenants, he is therefore not in personal occupation of any dwelling-house. That being so, he appears to me to come within the fundamental principle of the Act that it is to protect a resident in a dwelling-house." Those words go a very long way to deciding this case, but Scrutton L.J. adds "not to protect a person who is not a resident in a dwelling-house, but is making money by sub-letting it." It is argued that, having regard to the fact that the Acts deal with sub-tenancy, those words, as a statement of principle, must be limited to cases where there is sub-letting. I do not think that that is so. In my opinion, the Lord Justice lays it down that the fundamental principle of the Acts is to protect a resident in a house. Greer L.J. does not deal with this question. Romer L.J., whose language is wider, says (2): "It has frequently been pointed out in the Courts, and it has been pointed out once more by Scrutton L.J. in the judgment that he has just given, that the principal object of the Rent Restriction Acts was to protect a person residing in a dwelling-house from being turned out of his home." The defendant in the present case does not reside in the house and has not resided in it for ten years. It certainly is not his home and, if an order for possession is made in favour of the plaintiff, it cannot be said that he has been turned out of his home. Romer L.J. continues: "Where, therefore,

(1) Ante p. 13.

(2) Ante p. 18.

when the contractual tenancy comes to an end, the tenant is not in physical possession of any part of the premises, there is nothing in the Act which enables him to resist the claim of his landlord to possession, whether he has gone out without sub-letting the premises or whether he has sub-let the premises as a whole. Where he has sub-let the premises as a whole I think that he has ceased thereby to be entitled to the protection otherwise afforded him by the Act, and I think this was so even before the introduction by the Act of 1923 of para. (*h*) to sub-s. 1 of s. 5 of the earlier Act, a paragraph which I think was introduced by the Act of 1923 really for the purpose of quieting any doubts that may previously have existed on the subject."

That, I think, answers the point submitted here on behalf of the defendant, that, if the county court judge were right in his reading of the Act, para. (*h*) of s. 5, sub-s. 1, of the Act of 1920, as re-enacted in s. 4 of the Act of 1923, was unnecessary, because, if a tenant who is not in possession of the premises were outside the Act, it would be unnecessary to provide for granting possession in those particular circumstances. Romer L.J. continues: "If it be right, as I think it is, to say that a tenant, who has given up possession of the whole of the premises, or who has sub-let the whole of the premises, is not entitled to the protection of the Act when his contractual tenancy comes to an end, it is equally true that where the contractual tenancy has come to an end and the tenant has given up possession of the residential portion of the premises and only remains in possession of part of the premises used solely for business purposes he is outside the protection afforded by the Act."

We have had a great deal of argument based on various provisions of the Acts. Some of those provisions support the view which I think is right. To some extent I think that that is true of para. (*b*) of s. 5, sub-s. 1, of the Act of 1920, as re-enacted by s. 4 of the Act of 1923, although a tenant who is not resident might be brought within its terms if he allowed the premises to be used for, for example, immoral or illegal purposes, or if he allowed the condition of the dwelling-house to deteriorate. The argument with regard to para. (*d*) of that sub-section is stronger. The provisions of that paragraph certainly show that what the statute is dealing with is the hardship of a man who, to use the language of Romer L.J., " is turned out of his home." I think that the same remark applies to the provision as to widows, etc., in para. (*g*) of s. 12, sub-s. 1, of the Act of 1920. Those provisions appear to be directed to the case of the resident tenant.

Conscious as I am that it involves a departure from *Collis* v. *Flower* (1) and *Mellows* v. *Low* (2) and the conclusion that *Kreitman* v. *Vidofsky* (3) cannot be reconciled with what the Lords Justices say in *Haskins* v. *Lewis* (4), and, although we feel embarrassed by the fact that apparently none of the authorities mentioned were brought before the Court of Appeal in *Haskins* v. *Lewis* (4), it seems to be our duty to follow what the judges in the Court of Appeal have said.

In my opinion, therefore, the county court judge was right and this appeal must be dismissed.

FINLAY J. I agree. I will add a word on one point only. This case is extremely difficult to deal with, because there are several authorities which are much in point—*Kreitman* v. *Vidofsky* (3) is precisely in point—and are in favour of the defendant. But, on looking at the decision of the Court of Appeal in *Haskins* v. *Lewis* (4), it does appear to me that Scrutton and Romer L.JJ. intended to lay down the principle on which these cases ought to be decided. In view of that principle I cannot see how *Kreitman* v. *Vidofsky* (3) and the two cases which preceded it can stand. No doubt, having regard to the fact that the circumstances in *Haskins* v. *Lewis* (4) were very different from those in the present case, and having regard also to the fact that the various decisions of the Divisional Court do not appear to have been cited to the Lords Justices and certainly were not discussed by them in their judgments, the position is difficult. On the whole, however, I have come to agree with the view expressed by Talbot J. that the two passages which he has read from the judgments of the two Lords Justices lay down the principle which we ought to follow. I, therefore, agree that the appeal should be dismissed.

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(1) [1921] 1 K. B. 409.

(2) [1923] 1 K. B. 522.

(3) 43 Times L. R. 335

(4) Ante p. 1.

Appeal dismissed.

G. F. L. B.

The defendant appealed. The appeal was heard on July 15 and 16.

Safford for the appellant submitted substantially the same argument as in the Divisional Court.

Frank J. Powell for the respondent was not called upon.

SCRUTTON L.J. This action was brought to recover possession of a dwelling-house from the defendant Geary. The county court judge has found that for the last ten years Geary and his wife have been living elsewhere, and that he was not a tenant in actual occupation of the house. It appears that from the time Geary went to live elsewhere he paid the rent to the plaintiff for the house now in question, which was then occupied, presumably with his consent, by two relations of his wife and, later, by his sister. It does not appear whether those persons paid rent to Geary, who then paid it to the plaintiff, or whether they were living there rent free. It may be that they were tenants at will. However that may be, the county court judge's finding is that for ten years Geary and his wife have been residing at another house ten miles off, that Geary is not the tenant in actual occupation, that the occupation of Geary's and his wife's relations was not for the purpose of preserving the house for the tenant, and that at no time did he contemplate residing in the house again. Two members of this Court—the third member expressing no opinion on the point—decided in *Haskins* v. *Lewis* (1) that where a house has been let to a tenant and it appears that he does not live in it but that a business is being carried on in two floors of the house not proved to be the

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(1) Ante p. 1.

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tenant's business and that the other floors have been sublet by the tenant, he cannot claim the protection of the Rent Restriction Acts. The difference between that case and the present is that in this there is no question of business premises, but it is found that the tenant, having his home elsewhere, is not the occupying tenant, and that he has no intention of returning to this house as his home. The question therefore is: Do the Rent Restriction Acts apply to protect a non-occupying tenant? The case is not one of a tenant who spends week-ends in a house, or of a sea captain who is absent for months it may be, but in fact returns between his voyages to his house, and has his wife and family living there while he is away.

The history of the Rent Restriction Acts shows that there has been a very gradual feeling of its way by the Court with regard to the principles upon which these Acts are to be worked. When they were drawn there is no evidence that Parliament or the draftsman ever thought out what rights they were giving to the tenant of a house to which the Acts applied. They never considered whether they were giving him something which the tenant could assign or could leave by will, or a property which on his death intestate would pass to his administrator, or which on his bankruptcy would pass to his trustee. Consequently the Courts have had to proceed slowly and with extreme caution. It is curious that it was not till 1929, that is fourteen years after the passing of the first Rent Restriction Act, that the question came before the Court in *Lovibond & Sons* v. *Vincent* (1) whether a statutory tenant could bequeath his interest in the tenancy by his will. This Court decided that he could not. In 1923, before the Rent Restriction Act of that year became operative, the question arose whether a statutory tenant could assign his whole interest for value. This Court in *Keeves* v. *Dean* (2) decided that he could not. By the Act of 1923 Parliament supported the view expressed in that case by enacting that an assignment by the statutory tenant of the whole of his interest in the tenancy should be a ground for making an order turning out the tenant. That left the difficult question whether the Act intended to put an assignment of part of the tenancy, that is a sub-letting, on the same footing as an assignment of the whole tenancy. In *Roe* v. *Russell* (1) the Court had to face that question, and it decided, in view of the language of the Act, that if the tenant resided in part of the dwelling-house he might sub-let the other part, but that if he ceased to reside in the house he lost the right to be considered as the tenant. Through these cases the Court was gradually moving to the view that the statutory tenant's right was not a right of property unless such a right was expressly given by the Acts, as, for instance, the right given on intestacy, a provision which has not yet come before this Court for consideration, but that the right of the statutory tenant is a purely personal right to occupy the house as his home. For instance, in *Keeves* v. *Dean* (2) Bankes L.J. said (3): "His right is a purely personal one, and as such, unless the statute expressly authorizes him to pass it on to another person, must cease the moment he parts with the possession or dies." That is the principle towards which the Courts have been working for some time. Again, in *Haskins* v. *Lewis* (4), I said (5): "One thing is quite certain, the original tenant is not residing in those floors; his sub-tenants are residing there. The consequence is that you have this position, that the original tenant is not occupying any part of the original tenancy, the original dwelling-house, so as to make him a tenant under the Act; he is not occupying the ground floor and the first floor as a residence, he is occupying them for business purposes; he is not occupying the attic and the basement as a residence, those portions of the house are being occupied by the sub-tenants, he is therefore not in personal occupation of any dwelling-house. That being so, he appears to me to come within the fundamental principle of the Act that it is to protect a resident in a dwelling-house, not to protect a person who is not a resident in a dwelling-house, but is making money by sub-letting it. That, I understand, is the principle which Swift J. intended to lay down in *Hicks* v. *Scarsdale Brewery Co.* (1)" Greer L.J. expressed no opinion for or against that view. Romer L.J. said this (2): "It has frequently been pointed out in the Courts, and it has been pointed out once more by Scrutton L.J. in the judgment that he has just given, that the principal object of the Rent Restriction Acts was to protect a person residing in a dwelling-house from being turned out of his home. Where, therefore, when the contractual tenancy comes to an end, the tenant is not in physical possession of any part of the premises, there is nothing in the Act which enables him to resist the claim of his landlord to possession, whether he has gone out without sub-letting the premises or whether he has sub-let the premises as a whole." It is quite true that in that case the facts were that a part of the premises had been taken out of the Act through being used as business premises, the tenant not residing in the other part but having sub-let it. It is contended by Mr. Safford, who has said all that can be urged on behalf of his client, that the Court has not yet decided what is to happen if there is no sub-letting but the position merely is that the tenant is not in actual occupation of the house. That is true, but I think that in view of the principle as stated in wide terms in the cases to which I have referred it is very difficult to distinguish this case from the previous cases in any logical way. In my opinion this underlying principle has been treated as governing the Acts—namely, that these Acts were passed during war time owing to the scarcity of houses, and the fact that very high rents were being claimed by landlords from tenants led to the intervention of Parliament, which fixed the rents which could be exacted, and in effect enacted that if a tenant paid the rent so fixed he should be allowed to remain in occupation. Parliament was dealing with a tenant who was in occupation and who was not to be turned out; it was not dealing, and never intended to deal, with a tenant who was not in occupation but who wished to say: "Although I am not in actual occupation I claim the right so long as I pay the rent to retain my tenancy." If that had been put forward Parliament would have received the suggestion with contempt. The Acts were passed in a hurry, the language used was often extremely vague, and so it was always possible to say in any particular case that there were no clear words in the Acts which dealt with the point. That was the argument advanced in one of the earliest cases, *Remon* v. *City of London Real Property Co.* (1) There the contractual tenancy had expired on a given date. A day or two afterwards the landlords, without the tenant's knowledge, entered on the premises, saying that they did so in exercise of their right of re-entry. Mr. Romer in the course of his argument for the landlords contended with vigour that there were no words in the Act which provided for such a case, and that the landlords were entitled to remain in. I there said this (2): "Mr. Romer argued very forcibly to us that though the policy were clear yet the Courts ought not to give effect to it unless they could find words apt in their ordinary meaning to justify them in so doing, and that the case of a landlord getting into possession of premises which under the agreement of tenancy he had a right to enter had not been dealt with by Parliament." The argument of Mr. Safford may be called the twin brother of that just quoted, put the other way, for he says that s. 4 of the Act of 1923 provides that an order for possession shall not be made except in certain specified circumstances, and where, he asks, are there any words in the section dealing with a tenant who is not in possession of the premises but is living somewhere else? Parliament, says Mr. Safford, has not dealt with that case. In my opinion it has not done so because it never contemplated the possibility of the tenant living somewhere else. A non-occupying tenant was in my opinion never within the precincts of the Acts, which were dealing only with an occupying tenant who had a right to stay in and not be turned out. This case is to be decided on the principle that the Acts do not apply to a person who is not personally occupying the house and who has no intention of returning to it. I except, of course, such a case as that to

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(1) [1929] 1 K. B. 687. (2) [1924] 1 K. B. 685.

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(1) [1928] 2 K. B. 117.
(2) [1924] 1 K. B. 685.
(3) [1924] 1 K. B. 690.
(4) Ante p. 1.
(5) Ante p. 13.

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(1) [1924] W. N. 189.

(2) Ante p. 18.

(1) [1921] 1 K. B. 49. (2) [1921] 1 K. B. 58.

which I have already referred—namely, of temporary absence, the best instance of which is that of a sea captain who may be away for months but who intends to return, and whose wife and family occupy the house during his absence.

The judges of the Divisional Court felt themselves embarrassed by certain previous decisions which I agree are not always consistent with the principle I have stated, but Talbot and Finlay JJ. came to the conclusion that the principle enunciated in *Haskins* v. *Lewis* (1) applied to the facts of this case. Talbot J., referring to *Kreitman* v. *Vidofsky* (2), said that he recognized that it "cannot be reconciled with what the Lords Justices say in *Haskins* v. *Lewis* (1), and, although we feel embarrassed by the fact that apparently none of the previous authorities mentioned were brought before the Court of Appeal in *Haskins* v. *Lewis* (1), it seems to be our duty to follow what the judges in the Court of Appeal have said." We now do that. In the Divisional Court the decision in *Lovibond & Sons* v. *Vincent* (3), was, I gather, not cited, but that case shows that this Court dealt with some of the earlier cases, and decided that the Rent Restriction Acts merely confer on a statutory tenant a purely personal right. I there said (4): "Possibly this view may render it necessary some day to reconsider previous decisions as to the position of executors, administrators and trustees in bankruptcy of statutory tenants; it is unnecessary however to do so now." Two of the decisions to which Talbot J. referred were *Collis* v. *Flower* (5) and *Mellows* v. *Low.* (6) In *Collis* v. *Flower* (5), which it will be noted was decided at a very early stage in the consideration of the Acts, the tenant of a dwelling-house died. By her will she appointed an executor. Another person who had resided in the house with her was the testator's residuary legatee. This person continued to reside in the house just as she had done while the tenant was alive. The landlord served a notice to terminate the common law tenancy upon the executor, who by law was the person entitled to that tenancy, and brought an action for possession against

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(1) Ante p. 1.
(2) 43 Times L. R. 335.
(3) [1929] 1 K. B. 687.
(4) [1929] 1 K. B. 693.
(5) [1921] 1 K. B. 409.
(6) [1923] 1 K. B. 522.

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both the executor and the residuary legatee, who was actually living there. The county court judge held that as there was no assent by the executor to the residuary legatee remaining there in part satisfaction of her rights as residuary legatee she was not the tenant, and that as the executor was not in occupation of the house he could not claim the protection of the Acts. The Divisional Court reversed that decision, holding that the executor was the tenant of the house and entitled to the protection of the Acts, although he was not in occupation of the house. In my opinion that decision was wrong for the reasons I have stated. The executor who had the common law tenancy which had been terminated by notice to quit was not in occupation, and in my opinion the original tenant having no right to dispose of the property by will could give no statutory right to the executor, who did not live in the house and who therefore could not claim to be a statutory tenant. That case is no longer an authority. The administrator case—*Mellows* v. *Low* (1)—stands on a different footing. There the original tenant died during her tenancy intestate. Consequently her rights passed to the administrator. No notice to quit was ever given and consequently the common law tenancy remained. The landlord claimed that on the death of the tenant intestate, with no member of the family residing in the house, the tenancy lapsed. It was held that the administrator derived title under the tenant, and consequently that her residence could not be interfered with. The point of that case which renders the decision right was that no notice to quit was given, and consequently the common law tenancy remained in the person entitled to it. The decision was right on the facts, but if notice to terminate the common law tenancy had been given the Court could not have said (unless the matter can be brought within the section as to intestacy) that the administrator not being in occupation was entitled to be protected by the Act. The third case to which the Divisional Court referred was *Hicks* v. *Scarsdale Brewery Co.* (2), in which in my opinion the view taken by Swift J. was right, while that taken by

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(1) [1923] 1 K. B. 522.

(2) [1924] W. N. 189.

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Acton J. was wrong. As to the other case—*Kreitman* v. *Vidofsky* (1)—which Talbot J. said was practically the same as this, I think it was wrongly decided.

For the reasons I have given the Act does not in my opinion apply to protect a tenant who is not in occupation of a house in the sense that the house is his home and to which, although he may be absent for a time, he intends to return. If it were to be held otherwise odd consequences would follow. The appellant in this case has contented himself with living in one house and claiming another. Suppose he had a number of houses. One object of the Acts was to provide as many houses as possible at a moderate rent. A man who does not live in a house and never intends to do so, is, if I may use the expression, withdrawing from circulation that house which was intended for occupation by other people. To treat a man in the position of the appellant as a person entitled to be protected, is completely to misunderstand and misapply the policy of the Acts. The appeal must be dismissed.

GREER L.J. I also have come to the conclusion that this appeal should be dismissed, but I cannot base that conclusion upon the same ground as Scrutton L.J. has put it. The decision of the county court judge cannot be disturbed because he made no mistake in law in the conclusion he arrived at with reference to the house in question. It is not unworthy of notice that until May 19, 1930, the appellant had a legal estate in the premises, although he had only a weekly tenancy, and till that date he had a contractual tenancy and as a contractual tenant he was entitled to occupy the premises himself or to allow some one else to occupy them, seeing there was no covenant precluding him from sub-letting or assigning them. When the notice to quit expired and the common law tenancy came to an end the appellant was sued in the county court for possession. The position then was that the people who had been occupying the premises were still in residence; the tenant—the appellant—

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(1) 43 Times L. R. 335.

had no intention of disturbing them; and he did not himself reside in the premises. It appears to me that the findings of the county court judge involve this, that there was a sub-tenancy of these premises and that the occupying tenants were sub-tenants, although they were not paying rent. If this view is right, the case is brought within s. 4 of the Act of 1923, which provides that "no order or judgment for the recovery of possession of any dwelling-house to which this Act applies . . . . shall be made or given unless . . . . (*h*) the tenant without the consent of the landlord has at any time after July 31, 1923, assigned or sub-let the whole of the dwelling-house . . . ." If this view is right it is unnecessary to consider the position further, but as other points have been dealt with in argument I think it right to express my doubt whether the mere fact of non-residence is sufficient to enable an order to be made for possession under the Act of 1920 as modified by the Act of 1923. To add to the provisions of s. 4 of the Act of 1923 that non-residence shall be a ground for taking the house out of the protection of the Acts seems to me to be legislation and not a decision on the meaning of the Acts. In every case which comes before this Court under these Acts we have to consider only the words used by the Legislature, and in my judgment we are restrained from making an order or judgment for recovery of possession except in the cases mentioned in s. 4. I agree that the section is dealing only with a claim for possession by an ex-landlord against an ex-tenant, that is, where the contractual tenancy has come to an end. It does not seem to me that mere non-residence justifies the Court in making an order for possession, inasmuch as it is not so provided in the Act. Moreover, a man may remain in possession in law, even if he is not physically upon the premises, if he is occupying the premises by a licensee, and if the county court judge's findings involved that the persons actually in occupation were mere licensees and had no tenancy, I do not think that the order for possession should have been made. It is quite true that the language used in some of the cases seems to indicate a larger view. I refer specially to the words used by Scrutton L.J.

in *Haskins* v. *Lewis* (1): "That being so [the tenant] appears to me to come within the fundamental principle of the Act that it is to protect a resident in a dwelling-house, not to protect a person who is not a resident in a dwelling-house, but is making money by sub-letting it." That proposition as a whole does not apply to the present case, for there is no evidence that the tenant was making money by sub-letting, but if I thought that by the words quoted Scrutton L.J. intended to state it as his opinion that non-residence is sufficient to justify an order for possession I am unable to agree with it. Further, the passage does not seem to be binding on this Court because of the qualification by the concluding words, "but is making money by sub-letting it." I agree that the language used by Romer L.J. is somewhat wider, but it also was not necessary for the decision of the case.

Two cases, one relating to the position of an executor and the other relating to the position of an administrator, have been cited to us. In the first of these—*Collis* v. *Flower* (2)—the executor had, as tenant at common law, the right to the premises until his tenancy was put an end to by a notice to quit. The residuary legatee of the deceased tenant was in possession of the house and the executor did not disturb her occupation. Notice to quit was then given to the residuary legatee and the executor. The county court judge held, first, that as there had been no assent by the executor to the residuary legatee taking the tenancy in part satisfaction of the legacy she was not the tenant of the house; and, secondly, that as the executor was not in occupation of the house he could not claim the protection of the Acts. The Divisional Court reversed that decision and held that the executor was tenant of the house and entitled to the protection of the Acts although he was not in occupation of the house. The question whether the executor could be deprived of his right to possession was not an easy one, and I have some difficulty in reconciling the decision of the Divisional Court with that of this Court in

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(1) Ante pp. 1, 14.

(2) [1921] 1 K. B. 409.

Lovibond & Sons v. *Vincent.* (1) *Collis* v. *Flower* (2) may be considered to have been rightly decided because, though the executor did not reside on the premises and though he was not physically in occupation, he had a right to possession and was the only person who had that right. Be that as it may, I do not think the ground of that decision touches the present case. In the other case, *Mellows* v. *Low* (3), the facts did not raise the position of a statutory tenant as there no notice to quit had been given.

The way in which these Acts have been framed and altered from time to time is an extraordinary one. According to the decision of the majority of the Court in *Haskins* v. *Lewis* (4), which I accept as binding upon us, an action for possession may be used not for the purpose of obtaining possession by the landlord, but merely for the purpose of putting an end to the right of a tenant who is not in possession. It seems to be an anomalous state of things, because one would have thought that an action for possession was an action for possession, and not for a declaration of title or a declaration that the title of an intermediate tenant had disappeared. It is too late to take that view, and I agree that in this case there can be judgment for possession as against the defendant for the reason I have given.

SLESSER L.J. I agree that the appeal fail on grounds similar to those stated by Scrutton L.J., whose language in *Haskins* v. *Lewis* (4) seems to me to cover this case exactly. He there said (5): " He [the tenant] appears to me to come within the fundamental principle of the Act that it is to protect a resident in a dwelling-house, not to protect a person who is not a resident in a dwelling-house, but is making money by sub-letting it." Romer L.J. expressed the same view without any qualification. Mr. Safford has relied on the words used by Scrutton L.J., " but is making money by sub-letting it." As I read *Haskins* v. *Lewis* (4) the majority of the

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(1) [1929] 1 K. B. 687.

(2) [1921] 1 K. B. 409.

(3) [1923] 1 K. B. 522.

(4) Ante p. 1.

(5) Ante p. 14.

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Court would have laid down the same principle even if the tenant had not been making money by sub-letting the premises, but had merely parted with the occupation as has been done in this case. Here the defendant parted with the occupation of the house for reasons of charity, kinsmanship or motive other than the motive of remuneration. In *Haskins* v. *Lewis* (1) Scrutton L.J., after making the observation I have quoted, added: "That, I understand, is the principle which Swift J. intended to lay down in *Hicks* v. *Scarsdale Brewery Co.*" (2) When I refer to the report of that case I see that Swift J. said that "the question depended on the meaning of the word 'possession' in s. 5, sub-s. 1, of the Act of 1920. The true meaning was actual possession. The conditions in the section upon which an order for possession might be made were all applicable to a tenant in occupation, and could not have been drafted to meet the case of a tenant in reversion who was in fact the landlord of the tenant in occupation." So that Scrutton L.J., in *Haskins* v. *Lewis* (1), has approved that principle irrespective of whether the tenant is or is not receiving pecuniary reward as consideration for giving up actual possession. Even, however, if *Haskins* v. *Lewis* (1) were not binding upon us, and it is true to say that the facts in that case show that money was paid as consideration for giving up actual possession, I think I should have come to the same conclusion. It must not be forgotten that the original Rent Restriction Act invaded the common law right of landlords to regain possession of their premises at the end of the tenancy, and the Rent Acts must be regarded as creating rights in statutory tenants which they would not have by reason of their original tenancy. In *In re Cuno. Mansfield* v. *Mansfield* (3) that great judge, Bowen L.J., said that "in the construction of statutes you must not construe the words so as to take away rights which already existed before the statute was passed, unless you have plain words which indicate that such was the intention of the Legislature."

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(1) Ante p. 1.
(2) [1924] W. N. 189.
(3) (1889) 43 Ch. D. 12, 17.

Slesser L.J.

I do not find in the language of s. 4 of the Act of 1923—reproducing with additions s. 5 of the Act of 1920—plain words to show that the Legislature intended that no order can be made for the recovery of possession of a dwelling-house or the ejectment of a tenant therefrom where the circumstances are such as in the present case. It is too late to argue that these Acts must not be looked upon as a whole, but are to be construed by extracting particular parts of them. In *Remon* v. *City of London Real Property Co.* (1) Bankes L.J. said (2): "If each of these sections is to be treated separately there is much force in Mr. Romer's contentions as to the literal construction to be placed upon the language used in them. They cannot, however, be so treated. They form part of the statute and they must not only be read together but as forming part of an entire whole. However much the draftsmanship of the Act may be open to criticism, the Court must endeavour to place a reasonable interpretation upon the statute, if the language used admits of such an interpretation." Having regard to the mischief with which the Acts deal and the invasion of the common law rights of landlords, it would not in my opinion be a reasonable interpretation of the statute for us to say that a tenant who has acquired the legal tenancy of a dwelling-house but who does not remain in actual possession thereof is entitled to the protection of the Acts. I therefore come to the conclusion that the restriction on the landlord's right to recover possession is confined to the case of persons who are tenants residing on the premises, meaning thereby not residing in the narrow sense, but tenants of whom it can properly be said that they are in actual occupation. I agree with Scrutton L.J. that although a person may be absent from the premises for a time, yet, if he has an intention to return to them, it may fairly be said that he is still in actual possession and therefore entitled to be protected. In this case the county court judge has found as a fact that the appellant Geary is not in actual occupation, that those who were in actual occupation were not there to preserve the house as

(1) [1921] 1 K. B. 49.

(2) [1921] 1 K. B. 55.

a residence for him, and that he did not intend to return to the house in order to occupy it. On those findings the county court judge was right in making the order which he did.

Appeal dismissed.

Solicitors for appellant: *Heald, Johnson & Co.*
Solicitors for respondent: *Burton, Yeates & Hart.*

J. S. H.

1931
June 4.

FOWKES *v.* LEICESTERSHIRE COLLIERY AND PIPE COMPANY, LIMITED.

Workmen's Compensation—Practice—Appeal—Recorded Memorandum of Agreement—Execution—Application for Leave to issue Execution—Reference to County Court Judge—Decision or Order under this Act—No Appeal to Divisional Court—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *Sch. I.* (4.)—*Workmen's Compensation Rules,* 1926, *r.* 82.

Para. 4 of the First Schedule to the Workmen's Compensation Act 1925, provides: "The Arbitration Act, 1889, shall not apply to any arbitration under this Act; but a committee or an arbitrator may, if they or he think fit, submit any question of law for the decision of the judge of the county court, and the decision of the judge on any question of law, either on such submission, or in any case where he himself settles the matter under this Act, or where he gives any decision or makes any order under this Act, shall be final, unless within the time and in accordance with the conditions prescribed by rules of the Supreme Court either party appeals to the Court of Appeal."

An appeal from a decision of a county court judge on an application for leave to issue execution in respect of compensation due to an injured workman does not lie to the Divisional Court, but to the Court of Appeal.

Warren v. *Roxburgh* (1912) 106 L. T. 555; 5 B. W. C. C. 263 does not apply to the rules now in force.

APPEAL from Ashby-de-la-Zouch County Court.

The respondent, Thomas Wright Fowkes, was employed by the appellants, The Leicestershire Colliery and Pipe Company, Ld., as a conveyor. On March 28, 1929, he met with an accident arising out of and in the course of his employment. He was injured by an iron girder falling on his right hand. At the date of the accident the respondent was twenty-seven years of age, and his average weekly earnings before the accident amounted to 2*l.* 13*s.* 2*d.* He was totally incapacitated for several weeks, and he received compensation at the rate of 1*l.* 6*s.* 7*d.* per week from the appellants, his employers, during total incapacity.

On October 14, 1929, he was given light work as a motor driver. An agreement was arrived at between him and the appellants, in the terms set out in a memorandum, which was sent to the registrar of Ashby-de-la-Zouch County Court, in accordance with s. 23, sub-s. 1, of the Workmen's Compensation Act, 1925, on January 22, 1930. The memorandum was headed: "In the matter of the Workmen's Compensation Act, 1925, and in the matter of an agreement between Thomas Wright Fowkes, of Gelsmoor, Coleorton (conveyor hand), and the Leicestershire Colliery and Pipe Company, Ld., whose registered office is at Ashby-de-la-Zouch," and was as follows: "Be it remembered that on the 28th day of March, 1929, personal injury was caused at New Lount colliery to the abovenamed Thomas Wright Fowkes, a workman under no legal disability, by accident arising out of and in the course of his employment. And that on the 14th day of October, 1929, the following agreement was come to by and between the said Thomas Wright Fowkes (hereinafter called the workman) and the said Leicestershire Colliery and Pipe Company, Limited (hereinafter called the employers) that was to say: That the employers agreed that the workman was in their employment on the said 28th day of March, 1929, and that personal injury by accident arising out of and in the course of such employment was caused to the workman and that such injury was not attributable to the serious and wilful misconduct of the workman. And that the average weekly earnings of the workman computed in accordance with the above-mentioned Act were 2*l.* 13*s.* 2*d.* And that on the 14th day of October, 1929, the employers agreed to employ the workman as a motor driver and to pay him the wage of 8*s.* 5*d.* per day and that such wage has since been increased to 8*s.* 9*d.* per day. And that the employers should pay to the workman during incapacity as compensation under the above-mentioned Act in respect of the said injury by accident a weekly payment calculated in accordance with section 9 of the said Act and that such payment should continue until ended diminished increased or redeemed in accordance with the said Act.

You are hereby requested to record this memorandum pursuant to section 23 of the above-mentioned Act.

Dated this 22nd day of January, 1930."

The memorandum of agreement was recorded in the county court on February 4, 1930.

On June 4, 1930, the respondent's solicitors gave to the appellants notice in the following terms: "Take notice that we intend to apply to the registrar at Ashby-de-la-Zouch on Thursday, June 12, 1930, ... on behalf of . . . . Thomas Wright Fowkes for leave to issue execution against the goods of . . . . Leicestershire Colliery and Pipe Company, Limited, in respect of the compensation payable by the said company to . . . . Thomas Wright Fowkes under a memorandum recorded in this Court on February 4, 1930, and for consequential directions and for costs.

Amount due from 19th October, 1929, to 15th February, 1930, at 7*s*. 6*d*. per week, 6*l*. 7*s*. 6*d*."

The application came on before the registrar, and he, under para. 4, of r. 82, of the Workmen's Compensation Rules, 1926 (1), referred the matter to the county court judge.

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(1) Workmen's Compensation Rules, 1926, r. 82: "EXECUTION. (1.) Where a party liable to pay compensation or costs under any award, memorandum, or certificate has made default in payment of the amount awarded, or where payment is to be made by instalments, of any instalment, the party entitled to such compensation or costs may apply to the Court for leave to issue execution against the goods of the party in default.

(2.) An application for leave to issue execution shall be made on notice in writing in accordance with the county court rules as to interlocutory applications.

(3.) Where the application is made to the registrar he may, if no cause is shown to the contrary, and on proof of the amount in payment of which default has been made, give leave for execution to issue.

(4.) If cause is shown to the contrary, or if the registrar is in doubt as to the proper order to be made, he may refer the matter to the judge, who may make such order or give such directions as may be just.

(5.) In particular, if in the case of a weekly payment the party liable to execution alleges that incapacity has wholly or partly ceased, the judge may, on such terms as to payment

Objection was taken to the jurisdiction of the county court judge on the ground that he was sitting as county court judge and not as arbitrator under the Act. The county court judge overruled the objection, heard the application, and remitted the matter to the registrar for him to ascertain the amount of compensation due to the respondent under the agreement and to give leave to issue execution for that amount.

Against that order the employers appealed, on the grounds: (1.) that the application for leave to issue execution was referred to the learned judge as county court judge and not as arbitrator under the Workmen's Compensation Act, 1925; (2.) that before the amount due by the employers to the workman could be ascertained, it was necessary that an issue be tried between the parties under the Act to determine what the workman was able to earn in some suitable employment; (3.) that neither the registrar nor the county court judge had jurisdiction to try that issue, which could only be tried by an arbitrator under the Act.

H. H. Joy K.C. and *T. N. Winning* for the appellants, the employers.

E. W. Cave K.C. and *C. E. Loseby* for the respondent, the workman. There is a preliminary objection to this appeal. An appeal from a decision of a county court judge on an application for leave to issue execution in respect of compensation due to an injured workman does not lie to the Divisional Court but to the Court of Appeal. Under para. 4 of the First Schedule to the Workmen's Compensation Act, 1925, the decision of the county court judge on any question of law submitted for his decision, or in any case where he himself settles the matter under the Act, or where he gives any decision or makes any order under the Act, shall be

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into Court or otherwise as may be just, adjourn the application for such time as he may think fit, to enable the party liable to execution to file a request for arbitration with respect to the review of the weekly payment. Any such adjournment shall be without prejudice to the right of the party applying for leave to issue execution to renew his application on good cause shown."

final, unless within the prescribed time and in accordance with the prescribed conditions, either party appeals to the Court of Appeal. If the order made by the county court judge was an order made under the Workmen's Compensation Act, 1925, there can be no appeal from it except to the Court of Appeal. The amount of compensation had been settled by agreement, and there was therefore no necessity for arbitration, and the procedure by execution is the only way of enforcing the recorded agreement. *Moakes* v. *Blackwell Colliery Co., Ld.* (1) In this case the county court judge has made an order under the Workmen's Compensation Act, 1925, and the Workmen's Compensation Rules, 1926. The appeal should be to the Court of Appeal. The Divisional Court has no jurisdiction to hear it. In *Sedgwick* v. *Leeds Forge Co., Ld.* (2), an appeal from an order of a county court judge giving leave to issue execution was brought to the Court of Appeal, and that Court dealt with it: see also *Johnston* v. *Henry Liston & Co.* (3)

H. H. Joy K.C. for the appellant. The point is: what was the question dealt with by the county court judge in this case? The county court judge was not sitting as arbitrator under the Workmen's Compensation Act, 1925, at all. The question which he had to decide was not a question under that Act. He was acting in this case as county court judge. In making the order which he did he was making it as county court judge and not as arbitrator under the Act. Therefore the appeal lies to the Divisional Court. In *Leech* v. *Life and Health Insurance Association, Ld.* (4) it was held that there was no right of appeal to the Court of Appeal from a decision on a matter which was outside the award: see also the statement in Willis's Workmen's Compensation, 27th ed., p. 472, that an appeal from a registrar granting leave to issue execution lies to the judge qua judge, and thence to the Divisional Court, on the authority of *Warren* v. *Roxburgh.* (5)

(1) [1917] 1 K. B. 565.
(2) (1930) 23 B. W. C. C. 144.
(3) [1920] 1 K. B. 99.
(4) (1901) 84 L. T. 414: 3 W. C. C. 202.
(5) 106 L. T. 555; 5 B. W. C. C. 263.

Swift J. This is an appeal from the decision of the learned judge of the county court of Leicestershire, holden at Ashby-de-la-Zouch, given on July 29, 1930. On the appeal being called on in this Court, Mr. Cave, on behalf of the respondent, took the preliminary objection that the appeal, if any, did not lie to the Divisional Court, but should have gone direct, under the provisions of the Workmen's Compensation Act, 1925, to the Court of Appeal. The facts upon which that preliminary point arises can be stated quite shortly. It appears that on March 28, 1929, the respondent, Thomas Wright Fowkes, met with an accident arising out of and in the course of his employment, and on January 22, 1930, a memorandum of an agreement between the appellants and the respondent providing for the payment of compensation to the injured workman during his incapacity, was filed with the registrar of the county court. On June 4, 1930, the respondent's solicitors gave to the appellants notice that they intended to apply to the registrar on June 12, for leave to issue execution against the goods of the appellants in respect of the compensation payable by the appellants to Fowkes under the memorandum which had been recorded in the county court on February 4, 1930. The matter duly came before the registrar, and he referred it to the judge, and the learned judge dealt with the matter by remitting it to the registrar to ascertain the exact amount of compensation which was due to the respondent under the agreement. It is from that decision or order of the learned county court judge, made upon that application, that this appeal has been brought to this Court

The question arises at once whether the appeal should be brought here, or whether it should have gone direct to the Court of Appeal. It seems to me that the answer to that question depends entirely upon para. 4 of the First Schedule to the Workmen's Compensation Act, 1925. Para. 1 of that Schedule contains provisions for settling any matter under the Act which has to be settled by arbitration, and paras. 2 and 3 further deal with arbitration. Then para. 4 provides: "The Arbitration Act, 1889, shall not apply to any arbitration under this Act; but a committee or an arbitrator may, if they or he think fit, submit any question of law for the decision of the judge of the county court, and the decision of the judge on any question of law, either on such submission, or in any case where he himself settles the matter under this Act, or where he gives any decision or makes any order under this Act, shall be final, unless within the time and in accordance with the conditions prescribed by rules of the Supreme Court either party appeals to the Court of Appeal; . . . ." If the order which the learned county court judge has made in this case is an order made by him giving a decision, or making any order, under the Act, it has to be final so far as this Court is concerned, at any rate, and if there is to be any appeal from it at all it must be, in accordance with the Act, to the Court of Appeal.

The only question, therefore, which we have to determine is whether this order, remitting this matter to the registrar of the county court, is an order made under the Workmen's Compensation Act, 1925. I confess that I find great difficulty in imagining it to be anything else than an order made under the Act of 1925. The injured workman brought his claim under the Workmen's Compensation Act, 1925, and indeed he had no other claim at all; the agreement made between the parties with regard to his compensation was filed under the Workmen's Compensation Act, and it attained the force of a county court judgment by reason of the provisions of the Act of 1925. The registrar was given power to give leave to levy execution upon the goods of the employer only by virtue of the Workmen's Compensation Act, 1925, and the rules made under it, and by no other power. Finally, the county court judge was entitled to interpose in the matter by virtue of the Workmen's Compensation Act, 1925, and the rules made thereunder, and by no other power. It cannot be said that he was making an order in this case except by virtue of the Workmen's Compensation Act, 1925. He was clearly purporting to do so, and if he has done it wrongly, having no power to make this order, then the proper tribunal to correct his mistake is the Court of Appeal. If the Act had stopped at the words "shall be final," it could not be contended that if the learned county court judge had made this order there could have been an appeal from it. It might be that some Court could issue a mandamus against him, or that proceedings in the nature of prohibition might lie against him to prevent him doing something which was manifestly wrong, but there could be no appeal from him. So it seems to me, whether he was right or wrong, it is not a matter that we can decide; so far as we are concerned, his decision is final, whether it be right or wrong. If it be clear that he acted without jurisdiction, then some tribunal should be moved to prohibit him from continuing to do so. But taking this as an appeal from his decision, I am satisfied that it is not to this Court but to the Court of Appeal that it should be taken, and that this application should be dismissed. I should add that I do not think the case of *Warren* v. *Roxburgh* (1), to which our attention has been called and to which the learned county court judge's attention was called, is of assistance to us, having regard to the fact that the rule—namely, r. 67—which was in force at the time when that case was decided, has now been completely altered by the wording which is to be found in r. 82. I think that the framers of the new rule clearly intended that an order of a county court judge made on a matter of execution should be an order which was made within the meaning of the Workmen's Compensation Act, 1925. The appeal should be struck out on the ground that this Court has no jurisdiction to hear it.

CHARLES J. I agree, and I have very little to add. It appears to me that the matter may be put shortly as follows. Objection was taken to the jurisdiction of the learned county court judge, it being alleged that he was sitting as a judge and not as an arbitrator, and it was submitted that he had no jurisdiction. He decided that he had jurisdiction, and

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(1) 106 L. T. 555; 5 B. W. C. C. 263.

1931

FOWKES v. LEICESTERSHIRE COLLIERY AND PIPE CO.

Charles J.

having decided that he had jurisdiction, he acted upon that decision. He therefore has given a decision under this Act, and, by para. 4 of the First Schedule, from that decision an appeal lies to the Court of Appeal and not to this Court. I think it is quite clear that that decision can only have been made by reference to the Workmen's Compensation Act, 1925, and, being a decision under that Act, it is a decision which can be reviewed only in the Court of Appeal.

Preliminary objection upheld.

Solicitors for the appellants, the employers: *Berrymans, for T. Haynes Duffell & Son, Birmingham.*

Solicitors for the respondent, the workman: *Field, Roscoe & Co., for Deane & Son, Loughborough.*

T. W. M.

PARKFIELD TRUST, LIMITED *v.* DENT.

1931
July 2.

Money-lender—Stamps—Note or Memorandum of Contract—Production as Evidence—Excessive Interest—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *ss.* 1, 14, *Sch. I.—Moneylenders Act,* 1900 (63 *&* 64 *Vict. c.* 51), *s.* 1—*Moneylenders Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 21), *ss.* 6, 10.

By the Moneylenders Act, 1927, s. 6: "(1.) No contract for the repayment by a borrower of money lent to him or to any agent on his behalf by a moneylender . . . . or for the payment by him of interest on money so lent and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract; and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given as the case may be. (2.) The note or memorandum aforesaid shall contain all the terms of the contract. . . . ."

By s. 10: "(1.) Where, in any proceedings in respect of any money lent by a moneylender after the commencement of this Act or in respect of any agreement or security made or taken after the commencement of this Act in respect of money lent either before or after the commencement of this Act, it is found that the interest charged exceeds the rate of forty-eight per cent. per annum, ... the court shall, unless the contrary is proved, presume for the purposes of section one of the Moneylenders Act, 1900, that the interest charged is excessive and that the transaction is harsh and unconscionable. . . . ."

By virtue of s. 10 of the Moneylenders Act, 1927, where a money-lender seeks to recover judgment against a borrower for more than a sum equal to the money lent and 48 per cent. per annum interest, he must satisfy the Court that, in all the circumstances of the case, the rate of interest which he claims to recover is not excessive and that the transaction is not harsh and unconscionable. Although the borrower does not appear to the writ, or does not further defend the action, the onus is still on the plaintiff money-lender to satisfy the Court on these two points. He must therefore prove a transaction which comes within s. 6 of the Moneylenders Act, 1927, and consequently he must prove a note or memorandum of the contract made in accordance with that section.

Such a note or memorandum is a memorandum of a contract within the meaning of the Stamp Act, 1891, s. 1, and the First Schedule to that Act, and therefore must be stamped with a 6*d*. stamp.

ACTION in the Short Cause list tried by Swift J.

The plaintiffs, who were licensed money-lenders, claimed to recover the sum of 414*l*. 10*s*. 8*d*., being the balance of the principal and interest due under a promissory note dated November 6, 1930, whereby the defendant agreed to pay the plaintiffs interest on 250*l.*, money lent, at the rate of 160 per cent. per annum, and to pay the principal and interest by consecutive monthly instalments of 50*l.* each.

On June 24, 1931, the plaintiffs obtained judgment under Order XIV. for 232*l.* 17*s.* 4*d.*, being the balance of the principal due, together with interest at the rate of 48 per cent. per annum, and it was ordered that the defendant, as to the balance of the claim, be at liberty to defend the action on condition that it be entered in the Short Cause list for trial by a judge alone. The action came on before Swift J. to determine the plaintiffs' claim for the balance of the interest at the rate of 112 per cent. per annum, being the excess over the 48 per cent. interest recovered under the judgment under Order XIV.

At the hearing the attention of the Court was drawn to the fact that the note or memorandum of the contract required by s. 6 of the Moneylenders Act, 1927 (1), was not stamped as required by the Stamp Act, 1891. (2)

R. F. Levy for the plaintiffs.

The defendant did not defend the action.

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(1) By the Moneylenders Act, 1927, s. 6: "(1.) No contract for the repayment by a borrower of money lent to him or to any agent on his behalf by a moneylender . . . . or for the payment by him of interest on money so lent and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract; and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given as the case may be."

Sub-s. 2: "The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and, either the interest charged on the loan expressed in terms of a rate per cent. per annum, or the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of the First Schedule to this Act."

Sect. 10: "(1.) Where, in any proceedings in respect of any money lent by a moneylender after the commencement of this Act or in respect of any agreement or security made or taken after the commencement of this Act in respect of money lent either before or after the commencement of this Act, it is found that the interest charged exceeds the rate of forty-eight per cent. per annum . . . . the court shall, unless the contrary is proved, presume for the purposes of section one of the

(2) See next page.

SWIFT J. Since the coming into operation of the Moneylenders Act, 1927, a money-lender who desires the Court to give judgment against a borrower for more than a sum equivalent to the money lent and 48 per cent. per annum interest must satisfy the Court that, in all the circumstances of the case, the rate of interest is not excessive and that the transaction is not harsh and unconscionable. Although the borrower does not appear to the writ, or does not further defend the proceedings, the onus is still upon the plaintiff money-lender, and he cannot have the judgment of the Court, even in default of appearance, unless and until he satisfies the Court that the interest charged is not excessive and that the transaction is not harsh and unconscionable: see s. 10 of the Moneylenders Act, 1927, and *Mills Conduit Investments, Ld.* v. *Leslie & Denholm.* (1)

The onus being upon the plaintiff money-lender to show that the transaction in respect of which he sues is not harsh and unconscionable, he is bound to prove what, in his particular case, "the transaction" was. He must therefore prove a transaction which comes within s. 6 of the Moneylenders Act, 1927, and consequently, he must prove a note or memorandum of the contract made in accordance with the provisions of that section.

Such a note or memorandum is, I think, clearly a memorandum of a contract within the meaning of s. 1 and the First Schedule of the Stamp Act, 1891, and therefore must be

Moneylenders Act, 1900, that the interest charged is excessive and that the transaction is harsh and unconscionable. . . . ."

By the Stamp Act, 1891, s. 1: ". . . . the stamp duties to be charged . . . . upon the several instruments specified in the First Schedule to this Act shall be the several duties in the said schedule specified. . . . ."

Sect. 14: "(1.) Upon the production of an instrument chargeable with any duty as evidence in any court of civil judicature in any part of the United Kingdom . . . . notice shall be taken by the judge . . . . of any omission or insufficiency of the stamp thereon. . . . ."

The instruments set out in the First Schedule to the Stamp Act, 1891, include:—

"Agreement or any memorandum of an agreement, made in England or Ireland under hand only, ... and not otherwise specifically charged with any duty, whether the same be only evidence of a contract, or obligatory upon the parties from its being a written instrument . . . . 6*d.*"

(1) [1931] W. N. 166.

stamped with a 6*d*. stamp. If it is not so stamped it cannot be produced in evidence unless the appropriate penalties are paid. The plaintiff cannot prove an enforceable transaction—he cannot have a judgment until he produces a memorandum complying with the requirements of s. 6 of the Act of 1927, and he cannot produce such a memorandum unless it is duly stamped. [The plaintiffs' solicitor undertook to stamp the memorandum and to pay any penalties imposed.]

In determining whether interest is excessive or a transaction is harsh and unconscionable the Court may consider, among all the circumstances, in addition to those mentioned by Channell J. in *Carringtons, Ld.* v. *Smith* (1) and Scrutton L.J. in *Reading Trust, Ld.* v. *Spero* (2), the fact that the borrower himself has never suggested that the interest is excessive or the transaction is harsh and unconscionable, and that he has not appeared and does not defend the action or ask for any relief: see Greer L.J. in *Mills Conduit Investments, Ld.* v. *Leslie & Denholm.* (3)

In this case the interest—160 per cent. per annum—is very high, but I am satisfied that having regard to all the circumstances, it is not excessive, and even if it were, I am satisfied that the transaction was not harsh and unconscionable, and I therefore give judgment for the plaintiffs.

Judgment for plaintiffs.

Solicitor for the plaintiffs: *Solomon Arbeid.*

(1) [1906] 1 K. B. 79.
(2) [1930] 1 K. B. 492, 503.
(3) [1931] W. N. 166.

T. W. M.

SLINGSBY AND OTHERS *v.* WESTMINSTER BANK, LIMITED.

1930
Oct. 14.

[1930. S. 2413.]

Banker—Cheque—Blank left after Name of Payee—Fraudulent Insertion of Name of pretended Agents of Payee—Materiality of Alteration—Endorsement in Name of pretended Agent only—Sufficiency in Form—Account of Drawers debited with amount of Cheque—Receiving Bank credited with amount of Cheque—Alleged negligence of Receiving Bank—Liability of Receiving Bank to Drawers—Bills of Exchange Act, 1882 (45 *&* 46 *Vict. c.* 61), *ss.* 64, 82.

The plaintiffs, who were the executors of one H. T. deceased, employed as their solicitor one Cumberbirch, who was a partner in the firm of Cumberbirch & Potts, and a solicitor of high repute. The executors wished to invest 5000*l.* of the trust money in the purchase of War Stock, and for that purpose intended to employ a firm of stockbrokers named John Prust & Co. A cheque was accordingly drawn on the plaintiffs' account at the Macclesfield branch of the District Bank for 5000*l.* in which the payees were expressed to be "John Prust & Co. or Order," and it was duly signed by the plaintiffs as executors of H. T. The cheque was prepared by Cumberbirch and was in his handwriting, a space being left between the words "John Prust & Co." and the words "or Order." The cheque was left by the plaintiffs with Cumberbirch to be used by him in accordance with the directions he had received. Cumberbirch, however, subsequently fraudulently added the words "per Cumberbirch & Potts" in the space between the words "John Prust & Co." and the words "or Order." He then endorsed the cheque "Cumberbirch & Potts" and paid it into the account of the Palatine Industrial Finance Company with the Manchester branch of the defendant bank. The cheque was dealt with in the usual way, the account of the Palatine Company with the defendant bank was credited with 5000*l.*, and the account of the plaintiffs with the District Bank was debited with that amount. Cumberbirch was the managing director of, and very deeply interested in, the Palatine Company. The plaintiffs sued the defendant bank to recover the 5000*l.* :—

Held, that the plaintiffs had no right to recover the money from the defendant bank—not for conversion of the cheque, because the cheque by reason of a material alteration had ceased to be a valid cheque, so that no action could be brought upon it; nor for conversion of 5000*l.* because there had been no conversion of any money of the plaintiffs; nor for money had and received because the money was not the money of the plaintiffs. Further, that the defendant bank had acted without negligence and were therefore entitled to the protection of s. 82 of the Bills of Exchange Act, 1882.

ACTION tried before Finlay J. at the Manchester Assizes without a jury.

The plaintiffs, who were the executors of Harry Turner deceased, brought their action to recover 5000*l.* from the Westminster Bank, Ld. The claim was put in various ways: for money had and received; conversion of a cheque the property of the plaintiffs; conversion of 5000*l.* the moneys of the plaintiffs.

The following statement of facts is taken from the judgment:

The facts are simple and are not really in dispute. The cheque sued on is dated December 4, 1929. It is drawn on the Macclesfield branch of the District Bank, Ld., for 5000*l.* It was written out by one Cumberbirch, who was a solicitor at that time in high repute practising in Macclesfield, and who acted as solicitor to the plaintiff executors. The payees were "John Prust & Co.," who were stockbrokers through whom the plaintiffs were minded to invest money. The cheque, thus prepared by Cumberbirch, and containing the name of the payees and the amount, was duly signed by each of the plaintiffs and left with Cumberbirch, of course to be used by him in accordance with directions he had received. Cumberbirch then, according to the facts as accepted by both sides, fraudulently added the words, "per Cumberbirch & Potts" upon the face of the cheque. Both sides agreed that this alteration, made of course after the cheque had been completed and signed, was a material alteration, with the result that under s. 64 of the Bills of Exchange Act, 1882, the cheque was avoided.

Cumberbirch was the managing director of a company called the Palatine Industrial Finance Company, Ld. That was a company whose main business appears to have been to finance hire-purchase agreements. This company had an account with the Manchester branch of the defendant bank. Cumberbirch, on December 5, 1929, endorsed this cheque, altered as above described, "Cumberbirch & Potts," and paid it into the account of the Palatine Company, which at the beginning of that morning was overdrawn by about 200*l.*, but had by transactions of the morning been placed 45*l.* in credit. It was not disputed that "Cumberbirch & Potts" was a proper endorsement of a cheque drawn in favour of "John Prust & Co. per Cumberbirch & Potts." (1) The cheque, thus paid in by Cumberbirch, was dealt with in accordance with the ordinary routine. It was passed through the Clearing House. The account of the Palatine Company with the defendants was credited with the 5000*l.*, and the account of the plaintiffs with the Macclesfield branch of the District Bank was debited with that amount.

It will, of course, be noted that in no possible view were the plaintiffs customers of the defendant bank. The Palatine Company were customers of the defendants, having an account at the Manchester branch into which this cheque was paid. Cumberbirch had an account with the Macclesfield branch of the defendants. But the account, so far as appears the only account, of the plaintiff executors was with the Macclesfield branch of the District Bank.

Neville Laski K.C. and *C. Gandy* for the plaintiffs.
A. T. Miller K.C. and *B. B. Stenham* for the defendants.

At the conclusion of the argument, which took place at Manchester, judgment was reserved.

Cur. adv. vult.

1930. Oct. 14. FINLAY J. read a judgment in which he stated the facts set out above and continued: It was submitted by counsel for the defendant bank that the action, however put, was entirely misconceived. Whatever may be the rights, so it was argued, of the plaintiffs against their own bank, who have debited them, they can have no right to recover against the defendants—not in conversion of the cheque because the cheque was by reason of the alteration a mere valueless piece of paper, not in conversion for 5000*l.* because there was no conversion of any money of the plaintiffs, not for money had and received because the money was not the money of the plaintiffs.

(1) Wright J. held in the case of *Slingsby* v. *District Bank, Ld.* (*Manchester*) (post, p. 588), which was an action on the same cheque, that the endorsement was not a proper endorsement of the cheque.

1930

SLINGSBY v. WESTMINSTER BANK, LD.

Finlay J.

I have come to the conclusion that this submission is right and ought to prevail. It seems clear that the document, when it came into the hands of the defendant bank, was not a valid cheque at all. It had been avoided by the material alteration made in it. This being so, it seems to me that no action can be brought upon it against the defendants. They have not dealt either with a cheque or the money of the plaintiffs, and on this short ground I think this action must fail.

In my opinion no question of negligence really arises. Apart from s. 82 of the Bills of Exchange Act, 1882, there can be no question of negligence, for there was no contractual relation between the defendants and the plaintiffs; and s. 82 is in my opinion inapplicable because this document when it came into the hands of the bank was not a cheque. But inasmuch as the question of negligence was fully argued before me and evidence was led on it, it is desirable that I should state my view on it. It is, in my opinion, established that the defendant bank acted not merely in good faith, but also without negligence. The care must be that which a reasonable business man would exercise in his own affairs, and the clerks and other officials must display and exercise that degree of intelligence and knowledge ordinarily required of persons in their position. For authority as to the measure of the duty I may refer to the two cases cited in the judgment which I have just delivered in *Slingsby* v. *Westminster Bank, Ld.* (1)—namely, *A. L. Underwood, Ld.* v. *Bank of Liverpool* (2); *Lloyds Bank* v. *Chartered Bank of India, Australia and China.* (3)

I had before me the head of the Interior Proof Department, the department in which all cheques are examined. He said that there was nothing connected with this cheque calculated to arouse any suspicion, and evidence agreeing with him on this point was given by Mr. Johnson, the assistant manager of the bank, and by Mr. Richards, an inspector of Martin's Bank, with a very extensive experience. The cheque was

(1) [1931] 1 K. B. 173, 189.

(2) [1924] 1 K. B. 775, 793.

(3) [1929] 1 K. B. 40, 69.

drawn by the executors; it was drawn as presented to the defendant bank in favour of "John Prust & Co. per Cumberbirch & Potts." The circumstance that the executors were the drawers is not one to arouse suspicion. The words "per Cumberbirch & Potts" were in fact added after the cheque was signed, but I am satisfied that this was not apparent on inspection. The endorsement was validly made in accordance with the "per" appearing on the face of the cheque. (1) The person making the endorsement was the senior partner in the firm, a solicitor of the very highest repute, well known to the bank both as a solicitor and as chairman of the Palatine Trust. That company carried on an extensive business; it had a loan account fully and amply secured, and a current account. I am satisfied that there was nothing in the position of the Palatine Company, or of its accounts, to arouse any anxiety or suspicion. Nor, I think, was the fact that Cumberbirch was paying in the cheque not to his private account, but to the account of the company of which he was chairman, calculated to arouse suspicion. One's knowledge, subsequently acquired, that the transaction was not in fact in order perhaps tends to make one think that inquiries, which might have revealed this fact, ought to have been undertaken. But it is necessary to remember that bank officials have to deal with a very large number of cheques every day, and cannot be expected to scrutinize each cheque and the circumstances surrounding it with the detailed care and skill of detectives. If there were circumstances which ought to have suggested to reasonable men the need for further inquiry, further inquiry ought to have been made, but I cannot, on the evidence, hold that there were such circumstances here.

If the view taken earlier in this judgment is correct, this question of negligence does not arise; but if the view is incorrect, then I hold that there was no negligence and the defendants are entitled to the protection of s. 82 of the Bills of Exchange Act, 1882, and on this ground also the case falls to be decided in their favour. There must therefore be judgment in favour of the defendants.

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(1) Wright J. held in *Slingsby* v. *District Bank, Ld.* (*Manchester*) (reported post, p. 588), which was an action on the same cheque, that the endorsement was not a valid endorsement.

Judgment for defendants.

Solicitors for plaintiffs: *Vaudrey, Osborne & Mellor, Manchester.*

Solicitors for defendants; *Sale & Co., Manchester.*

R. F. S.

1931
July 6, 7, 8, 9, 15.

SLINGSBY AND OTHERS v. DISTRICT BANK, LIMITED.

[1931. S. 1140.]

Banker—Cheque—Blank left after Name of Payee—Fraudulent insertion of Name of pretended Agents of Payee—Materiality of Alteration—Indorsement in Name of pretended Agents only—Sufficiency in Form—Alleged Negligence of Customer in drawing Cheque—Liability of Customer for Fraud of his Agent—Forgery—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 60, 64, *sub-s.* 1; *s.* 80.

The plaintiffs were the executors of a deceased testator, and as such they had an account with the defendant bank and employed as solicitors a firm called C. & P., the acting partner in which was C. On the instructions of the plaintiffs C. filled up in his handwriting a cheque payable to J. P. & Co., who were entirely different persons from C. & P., and the cheque was signed by the plaintiffs. In the cheque a blank space was left between the name of the payees and the printed words "or order," and C. without any further instructions altered the cheque by writing after the name of the payees the words "per C. & P." The cheque was then indorsed "C. & P.," and C. dishonestly paid it into the account at the W. bank of a company in which he was interested and which drew against it. The defendant bank credited and paid the cheque to the W. bank and debited it to the plaintiffs. In an action by the plaintiffs against the defendant bank claiming to be relieved from having the cheque debited to them, or to have the amount of it made good to them:—

Held, (1.) that the indorsement was not a proper indorsement of the cheque as altered, and that, in the absence of any good excuse for doing so, the defendant bank had no right to pay upon that indorsement, and could not claim the protection of the Bills of Exchange Act, 1882, s. 60 or s. 80; (2.) that the cheque, by the addition to the description of the payees, was materially altered within the meaning of the Bills of Exchange Act, 1882, s. 64, and was therefore avoided, subject to the proviso to that section, which however only entitled a holder in due course of the cheque to avail himself of it according to its original tenor —namely, as payable to J. P. & Co.; (3.) that the alteration was a forgery under the Forgery Act, 1913, s. 1, sub-s. 1; sub-s. 2 (*a*), which avoided the cheque;

(4.) that the plaintiffs in drawing the cheque in such a way as to leave the above mentioned blank space had not been guilty of any breach of duty towards the defendant bank which facilitated the fraud of C.:

London Joint Stock Bank v. *Macmillan* [1918] A. C. 777 distinguished and principle not applied;

(5.) that the plaintiffs were not responsible for the act of C. in altering the description of the payees, inasmuch as that act, even if it had not been criminal, was not within the scope of the authority given to him by the plaintiffs:

Lloyd v. *Grace, Smith & Co.* [1912] A. C. 716 distinguished;

and, further, inasmuch as that act was a forgery and therefore outside the scope of that authority:

Ruben v. *Great Fingall Consolidated* [1906] A. C. 439 and *Kreditbank Cassel* v. *Schenkers* [1927] 1 K. B. 826, principle applied;

And, consequently, that the plaintiffs were entitled to the relief which they claimed.

ACTION tried by Wright J. without a jury.

The following statement of the facts of the case is taken from the judgment of the learned judge.

The plaintiffs, Slingsby and three others, were the executors of one Harry Turner, deceased, and as such had an account with the defendant bank, the District Bank, Ld. (Manchester). They employed as solicitors in the affairs of the deceased's estate a firm called Cumberbirch & Potts, the acting partner being James Cumberbirch, who, until the troubles hereinafter mentioned transpired, was a man of good reputation in his profession. The executors met from time to time to decide on the administration of the affairs of the trust. On December 4, 1929, at a meeting they decided to invest 5000*l.* in war loan, and a cheque for that amount was at the meeting accordingly drawn on their instructions in the writing of J. Cumberbirch in favour of a firm of London stockbrokers, John Prust & Co., who were to be instructed to purchase the stock. The cheque was signed that day by three of the directors, and next day, December 5, 1929, by the fourth, Mrs. Slingsby. When so signed the payees were John Prust & Co. There was a space between that name and the printed words "or order." J. Cumberbirch, instead of posting the cheque to the brokers, altered it after Mrs. Slingsby had signed it, writing after the payee's name the words, "per Cumberbirch & Potts." None of the executors either knew of or authorized or assented to that alteration. J. Cumberbirch then took the cheque that afternoon (December 5, 1929) to the Westminster Bank at Manchester, filled in a paying-in slip signing it "James Cumberbirch," and paid the cheque into the account at that bank of a company, the Palatine Industrial Finance Company, Ld., of which he was chairman and to which he was indebted, as being a payment on his own private account. The cheque was indorsed "Cumberbirch & Potts." The Westminster Bank, without any question, accepted the cheque and credited the company's account, who drew against it. The cheque was passed through the Manchester clearing house and credited to the Westminster Bank by the defendant bank, who debited it to the plaintiffs' account. Neither the cheque nor any proceeds of it went to John Prust & Co., who never received the instructions which the plaintiffs directed J. Cumberbirch to send them, and who indeed knew nothing about the matter at all. The plaintiffs did not receive any scrip, but assumed that the matter had gone through correctly, till about March, 1930, when Cumberbirch's dishonesty was discovered. He had absconded and had not since been heard of.

On May 8, 1930, the plaintiffs commenced an action for conversion of the cheque against the Westminster Bank, which failed. (1)

On May 5, 1931, the plaintiffs commenced the present action against the defendant bank claiming to be relieved from having the cheque debited to their account.

The plaintiffs in their statement of claim stated (para. 4) that J. Cumberbirch unlawfully and without any authority given by the plaintiffs purported to indorse the cheque signed and altered as aforesaid by writing on the back thereof the name "Cumberbirch & Potts"; and that the purported indorsement was not a regular or proper indorsement;

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(1) See ante, p. 583.

(para. 5) that the Westminster Bank, Ld., presented the cheque at the clearing house to the defendants who, without the authority of the plaintiffs and in disregard of the instructions appearing on the face of the cheque and in disregard of the irregular and improper indorsement, paid the same and/or gave credit in cross-account for the amount thereof to the Westminster Bank, Ld., and debited the amount against the deposit account of the plaintiffs as executors at the Macclesfield branch of the defendants; (para. 6) that further or in the alternative having regard to the material alteration on the face of the cheque, the payment thereof by the defendants, so far as made out of moneys of the plaintiffs and/or the debiting of the amount of the cheque against the account of the plaintiffs, was unlawful and without the authority of the plaintiffs; (para. 7) that further or in the alternative the acts of the defendants amounted to a wrongful conversion of the said sum of 5000*l.* being moneys of the plaintiffs in the hands of the defendants as the plaintiffs' bankers; and (para. 8) that further or in the alternative the defendants acted negligently and in breach of their duty to the plaintiffs in paying the cheque without any or any due and sufficient inquiry having regard to the fact that the same did not appear to be indorsed by the payees therein named and/or by reason of the direction appearing on the face thereof; and the plaintiffs claimed :—

(i.) 5000*l.* moneys had and received by the defendants to the use of the plaintiffs, being moneys of the plaintiffs in the hands of the defendants as the plaintiffs' bankers, and/or

(ii.) A declaration that the account of the plaintiffs with the defendants was improperly debited with the said sum being the amount of a cheque dated December 4, 1929, drawn by the plaintiffs on the defendants that cheque having been materially altered prior to the payment by the defendants of the amount thereon, and/or

(iii.) Damages for the wrongful conversion by the defendants of the said sum, and/or

(iv.) 5000*l.* damages for negligence.

(v.) Interest at 5 per cent. till payment or judgment on that sum.

(vi.) Such further or other relief as might be necessary.

The defendants in their defence stated: (para. 3) that they denied that J. Cumberbirch added the words "per Cumberbirch & Potts" to the cheque unlawfully and/or without the knowledge of the plaintiffs, and that they denied the materiality of the addition if made; (para. 4) that they denied that the indorsement was unlawful and/or without authority, and/or that it was not a regular and/or proper indorsement; (para. 6) that the payment of the amount of the cheque to the Westminster Bank and the debiting thereof against the plaintiffs as alleged in para. 5 of the statement of claim was made by the defendants in good faith and without negligence; (para. 8) that they denied that there was any or any apparent or any material alteration on the face of the cheque, and that they further denied that the said payment and/or debiting was unlawful and/or without the authority of the plaintiffs; (para. 9) that the defendants denied that they wrongfully converted the moneys of the plaintiffs as alleged in para. 7 of the statement of claim or at all; (para. 10) that they denied that there was any duty upon them as alleged in para. 8 of the statement of claim; that they further denied that the cheque appeared not to be indorsed or to be improperly or insufficiently indorsed as alleged or at all and/or that the direction appearing on the face of the cheque was such as to put them on inquiry as alleged; and that even if there was any duty upon them there was no breach of that duty, and that they acted in good faith and in the ordinary course of business and without negligence and exercised all due skill and care; (para. 13) that in the alternative if—which was denied—the words "per Cumberbirch & Potts" on the face of the cheque were added unlawfully and/or without the knowledge or authority of the plaintiffs, and/or if—which was denied—the indorsement "Cumberbirch & Potts" was made unlawfully and/or without the knowledge or authority of the plaintiffs, then the defendants said that that payment and/or debiting was due to the failure by the plaintiffs to take reasonable and ordinary or any precautions or to exercise reasonable care to protect the defendants as their bankers and to prevent the defendants as such bankers from being misled and that such failure was in breach of the duty in that behalf owed by the plaintiffs as customers to the defendants as their bankers; and Particulars given under that paragraph were as follows: that the plaintiffs were under a duty to the defendants to draw the cheque with reasonable care and delegated the performance of the duty to J. Cumberbirch; that J. Cumberbirch was guilty of fraud and/or negligence in the drawing of the cheque in that he left a gap or space after the name of the payee large enough for an addition to be made therein to the cheque; that the plaintiffs signed the cheque with the space so left as aforesaid; that they knew and/or could and/or ought to have known that the space was there and took no steps to fill it or obliterate it; that they handed the cheque to J. Cumberbirch for the purpose of his dealing with the same, well knowing that it was drawn in his writing and that he could fill in the space without leaving any indication of any addition; that the plaintiffs further failed to add any words to the face of the cheque limiting its negotiability or otherwise securing payment to the drawees only; and that the plaintiffs thereafter allowed the cheque so made out by J. Cumberbirch as aforesaid to remain in the custody of J. Cumberbirch; (para. 14) that the defendants repeated the matters alleged in para. 13 hereof and said that the cheque was complete and regular on the face of it and was signed by the plaintiffs, and that the plaintiffs were estopped from denying that the cheque was their mandate to the defendants on which the defendants were bound and/or entitled to act; (para. 15) that the alleged damage sustained by the plaintiffs —if any, which was denied—was caused by or contributed to by the aforesaid negligence of the plaintiffs and that the defendants were under no liability to the plaintiffs in respect thereof; (para. 16) that in the further alternative the defendants said that J. Cumberbirch was the servant or agent of the plaintiffs for the purpose of the filling up and presentation of the cheque, and that if—which was denied—the plaintiffs had been wrongly debited with the said sum of 5000*l.* and/or had in any way lost or been deprived of that sum or of any sum, then that wrong debiting and/or loss and/or deprivation was or were due to the fraud of their servant or agent and the defendants were under no liability therefor; and (para. 17) that further the defendants would—if necessary—rely on the provisions of s. 60 and s. 80 of the Bills of Exchange Act, 1882. (1)

The action was tried on July 6, 7, 8 and 9, 1931.

It was agreed that for the purpose of the present action the earlier action might be disregarded, the claim and the issue pleaded and the evidence being different in the two actions.

The defendants called witnesses with a view to proving that cheques were in certain cases drawn payable to one person "per" another person, and that in these cases the cheques were indorsed in the name of the latter person.

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(1) Bills of Exchange Act, 1882: Sect. 60: "When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged . . . ."

Sect. 64: "(1.) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised, or assented to the alteration, and subsequent indorsers.

Provided that—Where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour."

Sect. 80: "Where the banker, on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof."

The nature and effect of the evidence is fully stated below in the judgment of Wright J.

The questions raised between the parties appear from the judgment.

Laski K.C., *C. Gandy* and *G. Corderoy* for the plaintiffs.

Cyril Atkinson K.C. and *W. Gorman* for the defendants.

July 15. WRIGHT J. read the following judgment: The plaintiffs in this action are seeking against the defendant bank, to be relieved in respect of a debit which the defendants claim to charge against them as having paid 5000*l.* on a cheque drawn on the defendants by the plaintiffs; the plaintiffs say that the debit is improper, and also put the claim in alternative ways. [His Lordship stated the facts substantially as above set out, and continued as follows:]

The two questions which it is convenient to first consider are whether the alteration was material, and whether the actual indorsement was a good and proper indorsement of the cheque as altered. The defendants called certain banking witnesses who stated in evidence that cheques were sometimes drawn in the form "Pay A. B. per X." It is not clear when this practice first grew up, but it appears to date at least to the early years of this century. The form is only used in a limited class of cases. The most numerous are for the collection of dividends by a bank for its customers; also, but less frequently, this designation of the payee is used when an agent is intended to receive money for his principal; for instance, when a solicitor, requiring money to accept completion of a conveyance for his client, receives a cheque payable to the client "per" the solicitor. Other similar occasions are of payment to the agents of an underwriting syndicate, to collectors for overseers, or to agents to collect payment against bills of lading. In all these cases the intention is that payment is to be made to A. B., but only by the instrumentality of X., who alone is to receive and give a discharge for the money, but in a representative capacity as agent or trustee of his principal and is to apply it for his benefit. The banking witnesses called by the defendants stated that the entire number of these cheques were only a fraction of 1 per cent. of all cheques dealt with, and of these cheques the most numerous class by far was that of dividends paid through a bank receiving payment in order to credit the customer's account. The witnesses called said that in their experience such cheques were indorsed, not A. B. per X., but simply X. Though it is clear that the indorsement should in general correspond with the description of the payees, they could give no reason except their experience why the indorsement should not be A. B. per X. It being admittedly the intention that X. should receive as agent for A. B., it would seem proper that the intention, indicated on the face of the cheque, should be reiterated in the indorsement. In such cases X. can only sign as authorized by A. B., and, if he has the authority of A. B. and can only sign in a representative capacity, his indorsement ought, in principle, it seems to me, to make this clear in correspondence with the description of the payee. That this is the correct indorsement is the opinion stated in a book called Answers on Banking Practice, issued by the Institute of Bankers, the recognized Society of Bankers, and a similar view is reiterated in the number published in December, 1930, of the Journal of the Institute of Bankers. These statements of opinion were put to the defendants' witnesses in cross-examination as conflicting with their opinion and as indicating that a different opinion existed in the banking profession. The witnesses agreed that the publications were the organs of the profession. The views there expressed were that the indorsements should be in the form A. B. per X., although the custom of paying dividend warrants discharged by the simple signature of the banker is well recognized. The article I have cited says: "If it is indeed the case that the practice of banks in regard to the correct form of indorsement for these cheques is becoming divergent, it is, we suggest, advisable that the older and safer practice should once again be established." The writer clearly means by the "older and safer practice" the practice of having the full indorsement, corresponding to the description of the payee, on the face of the cheque. The banking witnesses called in effect admitted they had proceeded by rule of thumb or tradition, and had never considered the question or known an instance where it had led to difficulty. But in my judgment it seems clear that, if X. has ex facie no right to receive the money except in a representative capacity, his signature should show that he is acting in accordance with that right, and he ought to sign in a representative capacity; he is not authorized to receive the money as his own, or to deal with it except for his principals. That is the intention.

In the present case the collecting bank, the Westminster Bank, were, on the face of the transaction, clearly receiving a cheque indorsed in the firm's name for the private account of one member of the firm, and that in itself appears at least doubtful banking practice. But it may be asked whether they could possibly have acted as they did if the altered cheque had been indorsed John Prust & Co. per Cumberbirch & Potts? The incomplete indorsement facilitated the fraud. Nor is the intention of the cheque consistent with it being indorsed over to third parties, except for purposes of collection; negotiation by the agent would presumably conflict with the intended destination of the money, and pro tanto would be fraudulent; but such a course would be facilitated if the indorsement were the simple and unqualified signature of the agent. No doubt the designated hand to receive payment is that of the agent and it seems that he can give a discharge, nor is the paying bank responsible for the disposal of the money. But I think the paying bank ought to require a signature indicating the position exactly as it is indicated by the mandate describing the payee.

The practice which the defendant's witnesses say has been followed in their experience may well be convenient and save trouble and may have worked well in the past, at least so far as these witnesses know, but in my judgment the practice cannot be justified in law. The defendant bank had no right to pay except under an indorsement corresponding to the mandate expressed on the cheque, which I am for this purpose assuming was drawn in the form in which it now appears. It was contended that the document if drawn in that form was not a cheque because the payee was not named or otherwise indicated therein with reasonable certainty as required by s. 3 and by s. 7, sub-s. 1, of the Bills of Exchange Act, 1882. I do not think it necessary to decide that point, though my inclination is against that contention.

If I am right in my opinion as to what is the correct form of the indorsement of the cheque as it was presented for payment to the defendants, it follows that the defendants cannot claim to have discharged it in accordance with the mandate. Nor can they claim the protection of s. 60 or s. 80 of the Act. (1) Sect. 60 deals with the case of a forged or unauthorized indorsement. In the present case Cumberbirch had only authority (assuming the alteration) to indorse the cheque in order to carry out his instructions, and could only properly indorse, if he had their authority, on behalf of Prust & Co.; the indorsement he made was therefore with fraudulent intent and without authority and was a forgery. But it was argued that the defendants could notwithstanding claim the benefit of the section because they paid in good faith (as they certainly did) and in the ordinary course of business, by reason of the practice among bankers of taking this form of indorsement; I do not, however, think the words "in the ordinary course of business" cover a departure from the terms of the mandate appearing on the face of the cheque or a failure to exact a correct indorsement; in my judgment s. 60 does not apply, even on the assumption of the altered cheque. The language of s. 80 is in some respects dissimilar to that of s. 60, but the differences do not affect the result in this connection. To pay on an improper indorsement is in my opinion, fatal to a claim under s. 80 by the defendant bank to have acted "without negligence."

I have in the above opinion ignored the fact that the cheque was altered in the way I have found. In my opinion that alteration was material. It was said by Brett L.J. in *Suffell*

(1) See note (1) ante, p. 594.

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SLINGSBY *v.* DISTRICT BANK, LD.

Wright J.

v. *Bank of England* (1): "Any alteration of any instrument seems to me to be material which would alter the business effect of the instrument if used for any ordinary business purpose . . . ." The alteration changed, as I hold, the nature of the mandate in an essential particular—namely, the description of the payee. Before alteration it was a cheque payable simply to John Prust & Co. and could only be discharged by or under the indorsement of John Prust & Co. After the alteration, if the view put forward on behalf of the defendants were accepted, the indorsement "John Prust & Co." was not only unnecessary but improper, but on what appears to me to be the true view, discharge was to be by a payment to Cumberbirch & Potts as agents for John Prust & Co., and on an indorsement by Cumberbirch & Potts signing in terms as agents for John Prust & Co. I hold this alteration to be a material alteration within s. 64, sub-s. 1, of the Bills of Exchange Act, 1882. (2) Indeed, I do not know that the defendants have contended the contrary. But under the section just cited, the alteration avoids the cheque, subject to the proviso. The defendants cannot charge the plaintiffs with a payment made, however innocently, on a void instrument, or a payment for which they cannot show a mandate from the plaintiffs to pay; the only mandate by the plaintiffs was to pay John Prust & Co. simpliciter, whereas the defendants paid on the simple indorsement of Cumberbirch & Potts, and in any case on an apparent mandate deviating in respect of the description of the payee.

Neither s. 60 nor s. 80 in my judgment protects the defendants in such a case. Sect. 60 deals with the case where the banker pays "the bill," that is the bill which is actually drawn on him and not some altered bill; and only deals with the case of a forged or unauthorized indorsement. Sect. 80 is similarly limited to payment of the cheque which is drawn and as it is drawn. Indeed, on the facts in this case it is impossible to say that there is a true owner other than the plaintiffs or such as the section contemplates. The only true owners, intended and indicated by the drawers, were to be John Prust & Co., and the cheque was diverted from them because it was stolen by Cumberbirch from the plaintiffs.

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(1) (1882) 9 Q. B. D. 555, 568.

(2) See note (1) ante, p. 594.

Nor does the proviso to s. 64, sub-s. 1, help the defendants. The alteration here is not apparent, but neither the defendants nor the Palatine Company can be deemed to be holders in due course, within s. 29, sub-s. 1, of the Act, because if my view of the incorrectness of the indorsement is right the cheque was not complete and regular on its face, even if it were ever issued. But on any view the proviso merely entitles the holder to avail himself of the bill as if it had not been altered, and enforce payment according to its original tenor; that must be as a bill payable to John Prust & Co., since original tenor cannot be limited to amount, nor is s. 64, sub-s. 2, exhaustive. To do so the defendants would have to show that they took from John Prust & Co. and under his indorsement, which obviously is out of the question. A somewhat analogous case is the *Bank of Montreal* v. *Exhibit and Trading Co.* (1), where, however, the main point decided was under the Stamp Act, 1891. In *Goldman* v. *Cox* (2) the name was altered by the addition of the initial S. This was held to be a material alteration and a forgery. In the present case I hold that the alteration was material, and I also hold that the alteration was a forgery, done fraudulently by Cumberbirch. What he did was the making of a false document in order that it might be used as genuine within the meaning of the Forgery Act, 1913, s. 1, sub-s. 1, and by means of a material alteration within s. 1, sub-s. 2 (*a*), of the same Act. On these grounds the plaintiffs would appear to be entitled to succeed in their claim that the defendants cannot debit their account with the cheque in question.

But the defendants still rely on two contentions by way of answer. In the first place they say that the alteration in the cheque was caused by a breach of duty on the part of the plaintiffs towards the defendants in drawing the cheque as they did, and thus facilitating the fraud, with the consequence that the plaintiffs have to bear the loss as between themselves and the defendants, on the principle laid down in *London Joint Stock Bank* v. *Macmillan.* (1) The House of Lords held in that case—which put an end to some uncertainty of judicial opinion—that customers of a bank in drawing a cheque owe a special duty to the bank, described in the words of Kennedy L.J. in *Lewes Sanitary Steam Laundry Co.* v. *Barclay, Bevan & Co.* (2) (cited by Lord Haldane in *London Joint Stock Bank* v. *Macmillan* (3)) as being " A duty to be careful not to facilitate any fraud which, when it has been perpetrated, is seen to have, in fact, flowed in natural and uninterrupted sequence from the negligent act." The special duty arises out of the relationship of banker and customer, and the fact that the banker is bound, if he has funds, to act upon his customer's mandate embodied in a cheque, and is entitled to have that mandate expressed in clear terms and in a form not lending itself to alteration by a forger. " If the person who receives the mandate is misled by the fault of the person who gives it, the loss must fall exclusively on the giver "—to quote the words of Lord Macnaghten in *Scholfield* v. *Earl of Londesborough* (4), who was there distinguishing from the case of a cheque the position of the acceptor of a bill and a subsequent holder, between whom there is no mandate, as was held to be the position in that case.

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(1) (1906) 11 Com. Cas. 250. (2) (1924) 40 Times L. R. 744.

The question is whether in the facts of the present case there was any breach of that duty. I do not think there was. I take the extent of the duty as described by Lord Finlay L.C. in the *London Joint Stock Bank* v. *Macmillan.* (5) " The question whether there was negligence as between banker and customer is a question of fact in each particular case, and can be decided only on a view of the cheque as issued by the drawer, with the help of any evidence available as to the course of dealings between the parties or otherwise. If the existence in a cheque of blank spaces of an unusual nature and such as to facilitate interpolation is

(1) [1918] A. C. 777.

(2) (1906) 11 Com. Cas. 255.

(3) [1918] A. C. 777, 815.

(4) [1896] A. C. 514, 545.

(5) [1918] A. C. 777, 810.

declared to be no evidence of a breach of duty as between customer and banker, the duty would have little left to operate upon." The liability is put on negligence, that is to the neglect of reasonable precautions. The customer is to use ordinary care as to the manner in which the cheque is drawn. If he leaves blank spaces to the left of the words and figures, that gives an opportunity to a forger to insert words and figures which will alter the amount. This is the class of forgery illustrated by *Macmillan's* case (1), *Young* v. *Grote* (2) and other cases; the risk is one which is obvious and well recognized, as to which most banks insert a warning on the cheque book they issue. In the present case the position is different; there was a space to the right of the payee's name between that and the words "or order" and Cumberbirch utilized that space to write in the words "per Cumberbirch & Potts." But I do not think such a space is unusual; in twenty-two cheques drawn up in Cumberbirch's handwriting and signed by the plaintiffs there was such a space; in eight Cumberbirch had put a dash in the space. No one could reasonably, as I think, be expected to anticipate such an alteration. Of the four plaintiffs, three were business men, but they had never heard of such a form of describing the payee; it cannot be known to many people outside the bankers who occasionally have to deal with it, and then mainly in the form of dividend cheques. I do not think the risk of such a forgery was one which the plaintiffs could reasonably anticipate or be expected to guard against, even though the body of the cheque was in Cumberbirch's handwriting. I find that there was no breach of duty by the plaintiffs towards the defendants.

The defendants, however, raise a still further contention, which is that in any case Cumberbirch's fraud is one for which his employers are liable; and they rely on the case of *Lloyd* v. *Grace, Smith & Co.* (3) which makes it clear that the principal is liable for the fraud of his agent acting within the scope of his authority, even though it is done solely for

(1) [1918] A. C. 777.

(2) (1827) 4 Bing. 253.

(3) [1912] A. C. 716.

the agent's benefit and not at all for the principal's benefit. The crucial test is whether the act was in the scope of the agent's authority. The principal "put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in." These are the words quoted by Lord Macnaghten in his judgment (1), but it is necessary always carefully to ascertain the scope of the agency, both actual and ostensible, and compare it with the act of fraud. In the cases referred to the managing clerk of a solicitor, who was left practically in sole charge of the business, spoke and acted as one of the firm and gave a receipt for deeds in the firm's name, and induced the plaintiff to sign deeds put before her. She was induced to believe she was selling the property, but in fact she was conveying it to the fraudulent clerk. The solicitor was held liable for these acts of the clerk, who was held out and left to act as the alter ego of the solicitor.

In the present case Cumberbirch was charged with a limited duty in the matter in question; he was to fill in the cheque as directed; he was to obtain the signatures and then send the cheque to the brokers with instructions to buy the War Loan. He had no discretionary powers, but his functions were purely ministerial. Nor in what he did was he apparently acting within the scope of his authority, either actual or ostensible. Even if the cheque as the plaintiff signed it had been what it appeared to be after being altered, the use of the cheque by Cumberbirch was for purposes obviously alien to the trust estate; the plaintiffs were signing as executors and the cheque was being used by Cumberbirch for his own private purposes, regardless of any interests of John Prust & Co., whose name appeared on the face of the cheque in the position of payee. It is true the defendants as paying bankers would not know how the cheque came into the hands of the Westminster Bank or how that bank came to collect it, but the question is as to the acts of

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(1) [1912] A. C. 733.

Cumberbirch and whether they were within any actual or ostensible authority he might possess. I think this case is distinguishable from that of *Lloyd* v. *Grace, Smith & Co.* (1) Indeed, if *Lloyd* v. *Grace, Smith & Co.* (1) applied to such a case as this that principle might have been relied on in *Macmillan's* case (2)—which was later than *Lloyd* v. *Grace, Smith & Co.* (1)—but it was not relied on, nor was it suggested in any of the earlier cases of the same type which turn on negligence, not on liability for the agent's fraud. This appears to support my conclusion that the principle is inapplicable. Mr. Atkinson referred to certain observations of Lord Shaw in *Macmillan's* case (3): "My Lords, I do not here pronounce any judgment upon another type of case which may be figured. I refer to a case in which there has been no negligence on the part of the customer in the respect last alluded to, but in which erasures of great skill or deletions, say accomplished by chemical aid, have been made upon a cheque so as to undo all the care properly exercised by the customer in regard to its contents. Yet I cannot conceal from your Lordships that I should have the greatest doubt as to whether—this kind of roguery having been practised during that period of responsibility on the part of the customer to which I have referred—the customer would not also be liable." The period of responsibility which the learned lord there refers to is during the time in which the cheque was left in the possession of the plaintiff, and until it passed from his possession into the world at large. But I find no colour for any such opinion in the other judgments in that case, and if it were the law the careful discussions as to negligence on the part of the customer facilitating fraud would have been unnecessary.

I think there is a further ground why in such a case as this the drawers cannot be held directly liable as principals for the fraud of their agent—namely, that the fraud was an act of forgery. This question was discussed in *Ruben* v. *Great*

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(1) [1912] A. C. 716.

(2) [1918] A. C. 777.

(3) [1918] A. C. 777, 825.

Fingall Consolidated (1), and more recently, and since *Lloyd* v. *Grace, Smith & Co.* (2), in *Kreditbank Cassel* v. *Schenkers.* (3) In both those cases the forgery was in the signatures to the documents and the question was whether the documents were binding on the respective companies, on the principle that outsiders were entitled to assume that matters of indoor management were in order. In principle this question is not dissimilar from what is involved in the question whether an act is within an agent's ostensible authority. It was held that the question could not be raised in the case of a forgery. Though a man may be estopped by conduct from denying that a forgery is his signature, yet as forgery is a crime he cannot authorize it in advance (if indeed it is not a contradiction in terms to authorize a forgery) without being an accessory before the fact. Nor can he agree to be bound by it subsequently, so as to shield a criminal or compound a felony. Hence an act of forgery is a nullity and outside any actual or ostensible authority, and outside the principle of *Lloyd* v. *Grace, Smith & Co.* (2) It was said in *Ruben's* case (1) by Lord Loreburn, in a passage quoted by Bankes L.J. in the Court of Appeal in the *Kreditbank Cassel* case (3): "I cannot see upon what principle your Lordships can hold that the defendants are liable in this action. The forged certificate is a pure nullity. It is quite true that persons dealing with limited liability companies are not bound to enquire into their indoor management, and will not be affected by irregularities of which they had no notice. But this doctrine, which is well established, applies only to irregularities that otherwise might affect a genuine transaction. It cannot apply to a forgery." That supports the opinion I have stated. Further, in *Macmillan's* case (4), the act was a forgery and the liability was put not on agency but on estoppel. If I am right in the opinion I have expressed above that there was here no estoppel I do not think the principles of *Lloyd* v. *Grace, Smith & Co.* (2) assist the defendants' case.

(1) [1906] A. C. 439, 443.
(2) [1912] A. C. 716.
(3) [1927] 1 K. B. 826, 835.
(4) [1918] A. C. 777.

1931

SLINGSBY v. DISTRICT BANK, LD.

In my judgment the defences raised by the defendants fail and the plaintiffs are entitled to the relief claimed.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Vaudrey, Osborne & Mellor, Manchester.*

Solicitors for defendants: *Slater, Heelis, Sandbach, Marriott, Smiths & Irvine, Manchester.*

J. R.

C. C. A.

1931

July 30.

THE KING *v.* CHAPMAN.

Criminal Law—Carnal Knowledge—Reasonable cause to believe Girl over Sixteen—" Man of twenty-three years of age "—Criminal Law Amendment Act, 1922 (12 *&* 13 *Geo.* 5, *c.* 56) *s.* 2.

By s. 2 of the Criminal Law Amendment Act, 1922, a certain defence is open to "a man of twenty-three years of age." The accused was twenty-three years and six months of age at the time the offence charged was committed. He contended that he was "a man of twenty-three years of age" :—

Held, that, the language of the section being ambiguous, the accused was entitled to the benefit of the doubt, and was entitled to rely on the said defence.

APPEAL against conviction.

The appellant Thomas Chapman was convicted at the Huntingdonshire Assizes of carnal knowledge of a girl under sixteen years of age, contrary to s. 5, sub-s. 1 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69). By his defence he sought to take advantage of the proviso to s. 2 of the Criminal Law Amendment Act, 1922 (12 & 13 Geo. 5, c. 56), which enacts: "Reasonable cause to believe that a girl was of or above the age of sixteen years shall not be a defence to a charge under sections five or six of the Criminal Law Amendment Act, 1885 . . . . Provided that in the case of a man of twenty-three years of age or under the presence of reasonable cause to believe that the girl was over the age of sixteen years shall be a valid defence on the first occasion on which he is charged with an offence under this section."

The appellant was born on September 27, 1906, and the offence was committed in March, 1930; he was therefore about twenty-three years and six months of age at that time. This was the first occasion on which he had been charged with an offence under the section, and the jury found that there was reasonable cause to believe that the girl was over sixteen years of age, and that the appellant did so believe.

The appellant was convicted and sentenced to six months imprisonment in the second division. He appealed against his conviction, and the appeal came on for hearing on June 15 before Lord Hewart C.J., Finlay and Hawke JJ. Owing to a difference of opinion among the judges the case was reserved for the consideration of a Court of five judges, the appellant being released on bail.

Alban Gordon for the appellant. The appellant is entitled to the benefit of the proviso to s. 2 of the Act of 1922.

[LORD HEWART C.J. Is a man entitled to plead infancy until his twenty-second year ?]

No, because infancy ceases at a definite instant of time, and immediately afterwards the infant passes into another stage. But in a popular sense a man is twenty-three until he is twenty-four, and in *Reg.* v. *Commissioners of Income Tax* (1), Fry L.J. said: "There are some rules of construction to which it is convenient to refer. The words of a statute are to be taken in their primary, and not in their secondary, signification. If, therefore, the words are popular ones they should be taken in a popular sense, but if they are words of art they should be prima facie taken in their technical sense." The words of the proviso are popular, not technical. In s. 1 of the Act of 1922, where the Legislature intended to fix a maximum age, it uses the words, "under the age of sixteen," and the latest time at which the section is operative is the day before the attainment of the age of sixteen years. In the proviso to s. 2 of the same Act, in which the Legislature also intended to fix a maximum age the words are, "of . . . . or under" the age. The Legislature can hardly be taken by this alteration, to have intended to add one day only to the

(1) (1888) 22 Q. B. D. 296, 309.

maximum age; the alteration of the wording in the same statute must be taken to have had a definite purpose more important than that: see per Lord Esher M.R. in *Brighton Guardians* v. *Strand Guardians*. (1)

[ROCHE J. Is it not enough for you to say that the language of the proviso is ambiguous and that, therefore, the benefit of the doubt should be given to the accused?: see Maxwell on the Interpretation of Statutes, 7th ed., p. 244.]

Yes. Wright J. said the same thing in *London County Council* v. *Aylesbury Dairy Co.* (2)

[He was stopped.]

Linton Thorp for the Crown. *Reg.* v. *Commissioners of Income Tax* (3) decided that where a statute is dealing with technical matters its words must be given their technical meaning, and the calculation of time is a technical matter. Sect. 2 of the Act of 1922 contemplates three categories: (1.) men under twenty-three; (2.) those over twenty-three, and (3.) those of twenty-three. The first may be ignored in this case, and the proviso is dealing only with the third category, which comprises men of twenty-three years of age, where the Legislature is dealing with the exact time to which it intends its concession to extend. A man is twenty-three years of age for one day only. Holt C.J. in *Fitzhugh* v. *Dennington* (4) said: "the end of seven years was the last day of the seven years, for there is no fraction of a day; and after 12 o'clock at night is after the seven years." The maxim that the law takes no account of fractions of a day should be applied to a year. The words "a man of twenty-three years of age" mean "a man who has attained the age of twenty-three years of age."

[*In re Shurey* (5) and Coke upon Littleton, 79A, s. 104, were also referred to.]

Where one is dealing with language which is capable of extremely accurate interpretation there is no reason for adopting a more popular construction.

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(1) [1891] 2 Q. B. 156, 167.
(2) [1898] 1 Q. B. 106, 109.
(3) 22 Q. B. D. 296, 309.
(4) (1704) 2 Ld. Raymond, 1094, 1095.
(5) [1918] 1 Ch. 263.

C. C. A.
1931

REX
v.
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The judgment of the Court (LORD HEWART C.J., ROCHE, ACTON, HAWKE and HUMPHREYS JJ.) was delivered by

LORD HEWART C.J. The only substantial question in this appeal is whether a man in his twenty-fourth year is "a man of twenty-three years of age" within the meaning of the proviso to section 2 of the Criminal Law Amendment Act, 1922. The case for the appellant is that a man becomes twenty-three years of age on his twenty-third birthday and remains twenty-three until his twenty-fourth birthday. The appellant became twenty-three years of age on September 27, 1929, and the offence charged was committed in March, 1930. The words of the proviso to s. 2 of the Act of 1922 are: "Provided that in the case of a man of twenty-three years of age or under the presence of reasonable cause to believe that the girl was over the age of sixteen years shall be a valid defence on the first occasion on which he is charged with an offence under this section." Much argument has taken place and may yet take place on the meaning of the words, "of twenty-three years of age," but we have come to the conclusion that in this case the observations, based upon a series of cases, which are to be found in Maxwell on the Interpretation of Statutes, 7th ed., p. 244, apply. They are as follows: "Where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the Legislature which has failed to explain itself." On that ground the Court has decided to allow the appeal and quash the conviction.

Appeal allowed.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*

Solicitor for Crown: *Director of Public Prosecutions.*

W. L. L. B.

C. A.

1931

May 5.

STEDEFORD (INSPECTOR OF TAXES) *v.* BELOE.

Revenue—Income Tax—Headmaster—Pension—Voluntary Payment—Not "in virtue of office"—Non-chargeability to Income Tax—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. E—Finance Act,* 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 18.

In February, 1928, the headmaster of a school, by reason of ill-health, tendered his resignation, which was accepted, to take effect at the close of the term ending April 2, 1928. On March 21, 1928, a meeting of the warden and council of the school was held at which a resolution was passed to grant to the retiring headmaster an immediate payment of 1000*l.* and "an annual pension" of 500*l.* There was no scheme then in existence under which the headmaster could have qualified for a pension. and no negotiations took place between the headmaster and the warden and council before the payment was made. The council had the right at any time to rescind the resolution and to cease payment of the allowance :—

Held, that the allowance was not an annuity or pension chargeable to income tax under Sch. E of the Income Tax Act, 1918.

Drummond v. *Collins* [1915] A. C. 1011 ; *Lord Tollemache* v. *Inland Revenue Commissioners* (1926) 11 Tax Cas. 277 ; *Duncan's Executors* v. *Farmer* (1909) 5 Tax Cas. 417 distinguished.

Decision of Rowlatt J. affirmed.

APPEAL from a decision of Rowlatt J. on a Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners held on March 18, 1930, the Rev. R. D. Beloe (hereinafter called "the respondent") appealed against an assessment to income tax in the sum of 500*l.* for the year ending April 5, 1929, made upon him under the provisions of the Income Tax Acts.

1. The respondent was in December, 1914, appointed headmaster of Bradfield College, a corporation founded by Royal Charter, and consisting of a warden and trustees who as the warden and council controlled the affairs of the college. In February, 1928, he tendered his resignation, which was accepted to take effect at the close of the term ending April 2, 1928. His salary was 1000*l.* a year plus a capitation fee of 5*l.* for each boy over 200.

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2. The following was a copy of a minute of proceedings at a meeting of the warden and council of the college held on February 8, 1928:—

"It was decided particularly in view of the headmaster's ill-health that the resignation must be accepted but with regret. The warden was requested to communicate with Mr. Beloe in suitable terms."

3. The following was a copy of a minute of proceedings at a meeting of the warden and council of the college held on March 21, 1928:—

"The question of granting a pension to the Rev. R. D. Beloe, the retiring headmaster, was considered and ultimately it was unanimously resolved that he be granted an immediate payment of 1000*l.* and an annual pension of 500*l.* commencing on the 2nd April next when the current term ends payable out of the residue of income as defined in Statute No. 25."

4. Statute No. 25 of the Statutes referred to in the Charter was as follows:—

"The warden and council shall receive all fees and payments from the parents or friends of the boys, and out of the moneys so received shall pay all living and tuition expenses of the boys, the remuneration of the warden, sub-warden, headmaster, organist, the assistant masters, officers and servants, all rents, rates, taxes and premiums of insurance that may become due and other outgoings in respect of the college property and premises, the remuneration of the clerk, the costs, charges and expenses (if any) of the warden and council and of the trustees, and shall apply the residue of such payments and any other income which they may receive to such purposes as in their absolute discretion they may deem to be for the benefit of the college including in such purposes the payment of interest on or the repayment of capital of mortgages, the payment of any pension or retiring allowance to any person who may have held the office or position of warden, sub-warden, headmaster, organist or assistant master, officer or servant in the college or the payment of any contribution to any fund for the provision of pensions or retiring allowance for any such person or persons, and may at their discretion invest the residue of any such fees, payments or income received by them after making provision for all proper expenses in or upon any securities from time to time authorised by law for the investment of trust funds and may at the like discretion invest any income arising from such investments in a similar manner, with power for the warden and council at the like discretion to vary or transpose any such investments into or for any other investments of a similar character. And the warden and council may from time to time sell any such investments and apply the proceeds of such sales as if the same were income of the college received by them."

5. Evidence was given before the Commissioners which they accepted, that the charter contained no provision under which, nor did any scheme exist whereby, the respondent could have qualified for a pension. No negotiations with regard to a pension took place between the respondent and the warden and council before the payment was made. The respondent had received the said sum of 500*l.* for two years. It was paid automatically without a fresh authorization by the council each year, and was credited every quarter to the respondent's banking account. The warden and council of the college had the right at any time to rescind the said minute and cease payment of the said sum to the respondent, but had not in fact done so. There was now in existence a superannuation scheme for assistant masters, but this scheme did not apply to headmasters. The said sum of 500*l.* was paid out of the general fund of the college. One of the respondent's predecessors who was also warden of the college, Dr. Gray, had upon his retirement in 1910 been voted by way of pension a share of the profits of the college, but had received nothing until 1922, when a commuted payment without reference to profits was made to him. Another predecessor, Dr. White, had received no pension. There were, however, two ex-masters who were receiving pensions from the same source as the respondent. One of them had been paid for eight years and the other for five. There was no case on record in which a pension so granted by the college had been rescinded.

6. It was contended on behalf of the respondent that the payment of the said sum of 500*l.* was voluntary and not subject to income tax, and *Beynon* v. *Thorpe* (1) was relied on.

7. It was contended on behalf of the Inspector of Taxes (inter alia) that the said pension of 500*l.* was chargeable with income tax, not being in the nature of a personal gift, or charitable donation.

8. The Commissioners held, with considerable doubt, that the said sum of 500*l.* was voluntary on behalf of the warden and council of the college, that as there was no consideration for the same the respondent had no right of action to enforce payment, and the sum was not liable to income tax in his hands. They considered that *Beynon* v. *Thorpe* (1) supported this view, and accordingly allowed the appeal and discharged the assessment.

Rowlatt J. also thought that *Beynon* v. *Thorpe* (1) governed the case, and held that the pension was not subject to income tax.

The Crown appealed. The appeal was heard on May 5, 1931.

Since the hearing in the Court below the respondent, Mr. Beloe, had died, and the proceedings were continued against his executors.

R. P. Hills (*Sir William Jowitt A.-G.* with him) for the Crown. It is submitted that the pension in this case is chargeable to income tax.

By s. 14, sub-s. 3, of the Income Tax Act, 1918, such a payment was included as "earned income" for the purposes of relief, and by s. 18 of the Finance Act, 1922, pensions of this kind were transferred from Sch. D to Sch. E.

In *Duncan's Executors* v. *Farmer* (2) it was held that a voluntary pension such as that in this case was taxable under Sch. D as an annuity, but that it was not a pension for or in respect of an office of employment, as the office in that case had

(1) (1928) 14 Tax Cas. 1.

(2) 5 Tax Cas. 417.

ceased. Lord Dunedin there said (1): "I have never been able to see how it could possibly be said to be in respect of his office, when the whole reason it was given to him was that he was no longer in the office. . . . But while that is so, and while I think the tax is not chargeable under Schedule E, I confess I have been equally unable to see why it is not chargeable as an ordinary annuity under Schedule D." Since however that case was decided such an annuity, which under the Act of 1918 was taxable under Sch. D, has been transferred by s. 18 of the Finance Act, 1922, to Sch. E. What therefore Lord Dunedin said in *Duncan's Executors'* case (1) as to the taxability of such a payment under Sch. D now applies to a similar payment under Sch. E.

Further, the grant of the pension was made under Statute No. 25 of the Charter of the college by the governing body, and was paid by them under a charitable trust. It was therefore not voluntary, as the governing body under their Charter were compelled to apply their money in that way.

In *Beynon* v. *Thorpe* (2) Rowlatt J. indicated very clearly that where a pension was received as of right or with any certainty, so that it became a piece of property, it was taxable as a profit or gain. There is a line of authority dealing with the principle that where money is paid under a trust, it is income in the hands of the recipient.

In *Drummond* v. *Collins* (3) the argument for the taxpayer was that the payments to the children in that case were mere gifts, because the trustees had a discretion. The answer was, that when the discretion was exercised and the money paid, it was paid as the income of the children.

[LORD HANWORTH M.R. The trustees in that case could not have used the trust property for any other purpose than for the benefit of the children.]

Lord Wrenbury (4) held that the payments were income of the children, even though their interests were merely contingent.

(1) 5 Tax Cas. 417, 422.

(2) 14 Tax Cas. 1, 12.

(3) [1915] A. C. 1011.

(4) Ibid. 1020.

Then there are cases like *Lord Tollemache* v. *Inland Revenue Commissioners* (1) and *Sutton* v. *Inland Revenue Commissioners* (2), where the right to reside in a house, etc., was held to form part of the income of the beneficiary, even although the trustees had a discretion as to allowing such residence.

In the present case the trustees existed for the purpose of granting pensions of this kind, and the minute recording the resolution to grant the headmaster a pension would confer on him an enforceable claim in appropriate winding-up proceedings. It is true that the grant of a pension was subject to the discretion of the council of the college, but when that discretion was exercised, and the pension granted, the case in no way differed from *Drummond* v. *Collins.* (3) The terms of the Charter imposed an imperative duty on the trustees to grant such pensions. Lord Dunedin's judgment in *Duncan's Executors*' case (4) is a clear authority that a pension payable under a trust is taxable. This is a permanent and regular payment under a trust, and is therefore an annuity or pension and not a series of voluntary gifts.

Latter K.C. and *Cyril King* for the respondents, Mr. Beloe's executors, were not called upon to argue.

Lord Hanworth M.R. This is an appeal from a decision of Rowlatt J. confirming the decision of the Commissioners that the Rev. R. D. Beloe was not liable to pay income tax, under the provisions of Sch. E, upon a sum of 500*l.* received by him during the year ending April 5, 1929.

The facts are to my mind of great importance, because this and other kindred cases run on rather narrow lines. We are told by the Case that the respondent, Mr. Beloe, was the headmaster of Bradfield College, and was appointed to hold that office in December of 1914. He was to receive during his term of office a salary with a capitation fee on each boy over a certain number. Unfortunately, Mr. Beloe's health did not remain good and he was obliged to resign, and on

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(1) 11 Tax Cas. 277.
(2) (1929) 14 Tax Cas. 662.
(3) [1915] A. C. 1011.
(4) 5 Tax Cas. 417, 422.

February 8, 1928, the warden and council of the college were compelled to accept his resignation, which they did with regret. At that time, as now, the college was governed by a series of Statutes which are contained in the Royal Charter under which the college is constituted. Statute No. 25, which is set out in the Case, states that the council are to receive all fees and payments and so on; that they are to be the collecting body to receive the funds due to the college, and that they are to have power to make the payments in respect of salaries payable to the masters, and to pay out the various outgoings necessary in respect of the college property and keeping up the college in working order, and also that they are to have power to make a payment of any pension or retiring allowance to any person who may have held the office or position of (inter alia) headmaster; and that they may at their discretion invest the residue.

We are told that at the time when Mr. Beloe resigned there was no provision and no scheme in existence whereby the respondent could have qualified for a pension. In many schools plans to introduce pensions for the masters, whether contributory schemes or not, have been adopted, but in March of 1928 there was no scheme which provided for a payment to be made to the retiring headmaster of this college by way of compensation. No negotiations of any sort took place; no condition was imposed upon the headmaster. The acceptance on February 8 of his resignation was in unqualified terms. After that, on March 21, we have a minute in which the question of granting a pension to Mr. Beloe "was considered, and ultimately it was unanimously resolved that he be granted an immediate payment of 1000*l.* and an annual pension of 500*l.* commencing on the 2nd April next, when the current term ends, payable out of the residue of the income as defined in Statute No. 25." That is the statute, to the terms of which I have already referred. It does not matter what the exact words used are. Under the Revenue Acts we have to consider the substance of the matter. No importance, therefore, attaches to the fact that in this minute the word "pension" is used. If it had not been used the position would be just the same, if it is a pension within the meaning of the Income Tax Act. Whether or not it is so called would not be a determining factor in deciding whether Mr. Beloe is to be charged to or is immune from income tax. The fact that he received a payment of 1000*l.* immediately indicates that the governors were grateful for his services, sympathetic towards his position, and I doubt whether it could be contended that that payment of 1000*l.* was anything but a gratuity or present in recognition of the regard in which he was held by the governing body. It appears, for we are considering the year ending April 5, 1929, that the respondent had received the sum of 500*l.* for two years. That, I suppose, is told us by way of bringing the facts up to date. The Case is stated on August 29, 1930, but by the year ending April 5, 1929, there could have only been one payment of 500*l.* between the time upon which it accrued due or was payable, April 2, 1928, and April 5, 1929. We are told that arrangements were made whereby it was to be paid automatically without a fresh authorization. For the purposes of the case all that we have to consider is that it was a sum paid in that year and under these circumstances. The council of the college had the right at any time to rescind the minute and to cease the payment of the sum. We are also told that there is now in existence a superannuation scheme for assistant masters. The scheme does not apply to headmasters. Then we are given in para. 5 certain facts, which do not appear to be admissible as evidence upon the question that we have to decide and which, I think, might well have been excluded if objection had been taken on behalf of Mr. Beloe. They do not, however, make any difference to the problem that we have to consider.

Having received this 500*l.*—and I will add this, that whether we are considering the year ending April 5, 1929, or subsequent years, the facts seem to provide the same result—we have to consider whether this 500*l.* so received in this year 1929 or other years was a sum which falls to be taxed under the Income Tax Acts. The Commissioners, after considering the matter carefully, came to the conclusion that the payment of the 500*l.* was voluntary, as there was no consideration for the same and the respondent had no right of action to enforce payment, and they considered that *Beynon* v. *Thorpe* (1) supported that view. They thereupon discharged the assessment.

Now I think that this question is what one calls a mixed question of law and fact. There are matters which may be considered questions of degree and, if so, they are questions of fact. If the Commissioners have rightly directed themselves in law we could not vary their decision in fact; but Mr. Hills, on behalf of the Crown, says that they have not directed themselves correctly in law, because the effect of this donation or payment to the person who had been headmaster of Bradfield College was a pension or an annuity or a receipt by him bringing him within the ambit of Sch. E. Sch. E is the schedule under which taxation is to be made of annuities and sums which are received in respect of a public office or employment of profit. It was, however, decided by the Court of Session in *Duncan's Executors* v. *Farmer* (2), where a man had retired through ill-health and was no longer holding an office, and, indeed, had retired on condition that he completely resigned the parish, that there the income that he received or was paid could not be a sum which was payable to him in respect of his office, for he was clearly, not merely by the fact of his resignation, but by the terms of his resignation, no longer to be deemed to be the holder in any sense of his office. It was, however, held that the annuity was still chargeable with income tax and assessable under Sch. D. The law has, however, been altered in respect of that, and our attention has been called to s. 18 of the Finance Act, 1922, whereby offices and employment and pensions have been brought back within the ambit of Sch. E; the result being that the precise question that arose in *Duncan's Executors* v. *Farmer* (2) does not arise now, and Sch. E is once more enlarged so as to be what I might call the section for the purpose of charging pensions. That, however, does not decide or help us to decide this question. What we have to determine is this: Call it what you will, "pension" or "annuity" or "wages" or "perquisite" or "profit"—is it under any of those words a sum which is brought within the ambit of Sch. E?

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(1) 14 Tax Cas. 1.

(2) 5 Tax Cas. 417.

Now a large part of the argument has dwelt upon this fact, that the council and warden of Bradfield College had no power or would have had no power to make the payment unless they were armed with the authority under Statute No. 25, and it is said—it was so stated, we are told, by the Attorney-General in the Court below—that the moneys out of which the sum is paid are immune from tax by reason of their coming within the exception in favour of a charity which is provided by s. 37 of the Income Tax Act, 1918. That immunity, though, does not decide the case. The short sort of argument based upon it is this: "Inasmuch as this 500*l.* came from a source or came from the hands of those who do not pay income tax here is 500*l.* immune in the hands of the warden and council; somebody ought to pay income tax in respect of it, and as it has percolated to the hands of Dr. Beloe he had better pay." That is not the argument on which chargeability to income tax ought to be based. The question is whether in the hands of Mr. Beloe this sum is taxable. That is quite clear from the old case of *Herbert* v. *McQuade.* (1) The question that arose in that case was this, whether a clergyman who had received from the Queen Victoria Clergy Sustentation Fund a sum in augmentation of the income of his benefice was or was not liable to be assessed to income tax upon the receipt of that money as being profits accruing to him by reason of his office. It was held that he was. But when the case was in the Court of Appeal, Collins M.R. discussed the whole question, which has arisen so often, whether Easter offerings or moneys received by the clergy are in their hands taxable. After quoting from the judgment of Lord Curriehill, in *Inland Revenue* v. *Strang* (2), he proceeded (3): "Now that judgment, whether or not the particular facts justified it, is certainly an affirmation of a principle of law that a payment may be liable to income tax although it is voluntary on the

(1) [1902] 2 K. B. 631.
(2) 1878 15 Sc. L. R. 704.
(3) [1902] 2 K. B. 631, 649.

part of the persons who made it, and that the test is whether, from the standpoint of the person who receives it, it accrues to him in virtue of his office; if it does, it does not matter whether it was voluntary or whether it was compulsory on the part of the persons who paid it." Rowlatt J. referred to that principle in *Cowan* v. *Seymour* (1), where the question that arose was as to a sum voted to a man who had acted as secretary to a company without remuneration until his appointment as liquidator, and when the liquidation was completed he was paid a sum by unanimous resolution of the shareholders or the persons who had been shareholders. It was held that the sum which was voted by the shareholders to him because he had been liquidator and not in the course of liquidation was not chargeable to income tax.

We have here a case in which the man was not entitled to receive any pension. He did not fall within any scheme of pensions; he had no claim at all to receive any money, and it was not paid to him because he remained a schoolmaster. It was paid to him because of services that he had previously rendered, but also it was not paid to him because such a payment falling due after the completion of his term of office was a part of the contract under which he rendered the services. As in *Duncan's Executors* v. *Farmer* (2) this respondent held no office at all, and he had no right even to look to receive any sum of money from the council; and he had been paid 500*l*. in this particular year. It could have been withdrawn. The matter could have been reconsidered by the council, and I cannot see, when looked at from his point of view, he had a right to say that he was entitled to receive or was receiving in each year something which accrued to him by reason of his office, or that it was an annuity that he could surely count on, or that it was a pension to which he was entitled. Those facts, so far as they are facts, appear to be involved in the conclusion reached by the Commissioners and accepted by Rowlatt J.

I do not refer more to the cases about beneficed officers either in the Scottish Church or in the English Church. They are well known, and they fall sometimes on one side and sometimes on the other side of the line. We have here facts which seem to exclude the possibility of it being said, as in *Herbert* v. *McQuade* (1), that the only reason why this payment was made was because it was desired to increase the emoluments received by the respondent in the capacity of holding an office.

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(1) [1919] 2 K. B. 146, 152.

(2) 5 Tax Cas. 417.

Two cases, however, have been referred to with which I will deal. It is said that some guidance was to be obtained from *Drummond* v. *Collins* (2) and from *Lord Tollemache* v. *Commissioners of Inland Revenue.* (3) *Drummond* v. *Collins* (2) was a case in which there was a trust for the payment of sums by way of maintenance to the children—nephews, I think of the testator; that is at the discretion of the trustees, but there was that trust. It is quite true that the trustees might have refused to make any payment or made a payment of a smaller or larger sum, but a payment, if and when made, was received by the guardian of the children as being a payment for the account of the children and for their benefit, they being really cestui que trusts or beneficiaries of the trust, and as and when received by them it was held by the Court that the payment, looked at from the point of view of the recipients, was a sum to which they had become entitled under the terms of the will, the conditions for that payment being made to them under the will having been fulfilled.

Lord Tollemache's case (3) was a case in which a question arose as to super tax. Certain benefits were allowed to the person who was to be taxed, the opportunity, that is to say, of residing in a house—the maintenance and so on of the house being charged, not directly to the person who was in occupation, but charged to a trust fund. As I think I pointed out in my judgment in that case, it was a case just like the cases where money is paid over tax free. You have to add to the benefit received the value of the immunity from tax which has been enjoyed. Both those cases seem to be quite

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(1) [1902] 2 K. B. 631.
(2) [1915] A. C. 1011.
(3) 11 Tax Cas. 277.

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wide of the present case. It does not appear possible to hold upon the facts before us that Mr. Beloe was the beneficiary under a trust or a cestui que trust enjoying as of right this money, for the facts completely negative it. Under those circumstances it appears to me that the judgment of Rowlatt J. and the decision of the Commissioners must be affirmed.

I ought to add that the Attorney-General on behalf of the Crown has sought to bring this case before the Court of Appeal in order to ascertain whether the judgment of Rowlatt J. would be upheld or not, believing that the case may be a guide in a great number of other cases. Under those circumstances he has undertaken that all the costs incurred by the respondents as between solicitor and client should be paid by the Crown. That is a wise and generous offer on the part of the Attorney-General, and, therefore, the appeal will be dismissed and the respondents will be entitled to their costs under the terms of that agreement, not merely as between party and party, but as between solicitor and client.

LAWRENCE L.J. I agree, and have very little to add to the judgment delivered by the Master of the Rolls.

In the first place, I think it is clear that the allowance in question is not a profit payable to the respondent in respect of his having or exercising an office or employment of profit as mentioned in Sch. E. The allowance was only granted after the resignation of the respondent from the headmastership of the college, and only became payable to him after his office or employment of profit had ceased. There was no kind of bargain made between the warden and council of the college and the respondent as to the payment of the pension, which was a purely voluntary allowance.

The question then arises whether this allowance was an annuity or pension within the meaning of the Income Tax Acts. Before the year 1922 an annuity or pension was chargeable to income tax under Sch. D, and is now, under s. 18 of the Finance Act, 1922, chargeable to income tax under Sch. E. In my judgment the Commissioners and

Rowlatt J. were right in concluding that the allowance to the respondent was not an annuity or pension chargeable to income tax under Sch. E. As I have already stated, the so-called pension was a purely voluntary allowance and could be stopped at any moment. Mr. Hills has relied on *Duncan's Executors* v. *Farmer* (1) as an authority for the proposition that the allowance in the present case is taxable as an annuity or pension. In my judgment that case is distinguishable from the present case in that there the pension was granted on condition that Mr. Duncan should completely resign from the parish, and the Commissioners stated in the Case that the payment to Mr. Duncan was made to him "by virtue of his having held the office of minister of the Parish of Crichton, and in consideration of his complete resignation of the parish and surrender of the whole emoluments of the office to his successor in the pastoral charge of the parish." The Lord President relied upon the fact that the pension granted to Mr. Duncan could not have been revoked; that is to say, that it was granted for good consideration and was payable for the rest of Mr. Duncan's life as a matter of right which he could have enforced. The learned Lord President expressly distinguishes *Turner* v. *Cuxon* (2) (which was relied on in support of the contrary view) from the case before him, on the ground that the payment in *Turner* v. *Cuxon* (2) was a charitable payment by the Society and was a mere donation given each year with no certainty that it would be repeated the year following, whereas in the case before him—that is in *Duncan's Executors* v. *Farmer* (1)—there was a regularly constituted annuity granted by the Society. That case, in my judgment, shows the distinction between an annuity or pension which is paid to a man who has the right to receive and can enforce payment of it, and a payment which is purely voluntary, amounting in each quarter or half-year when it is paid to a fresh donation to the recipient.

But then Mr. Hills has relied upon another branch of cases illustrated by the case in the House of Lords of *Drummond* v.

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(1) 5 Tax Cas. 417.

(2) (1888) 22 Q. B. D. 150.

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Collins (1), and possibly by the case relating to super tax—*Lord Tollemache's* case (2)—before the Court of Appeal. In those two cases the payments made were payments to cestui que trusts in pursuance to the directions contained in the instruments under which the trustees were acting; they were payments made by trustees of a will either to or in favour of cestui que trusts under the will, and although they were made under a discretionary trust yet it was held that when they were made the recipient received them as a beneficiary under the will. Mr. Hills has suggested that that is the case here, by reason of Statute No. 25 of the Statutes governing the college. That statute is one which is inserted for the purpose of regulating the administration of the affairs of the college, and it provides that the warden and council are to receive all fees and payments in respect of the boys, and that out of those receipts they are to pay certain expenses, and that they are to apply the balance and any other income which they may receive to such purposes as in their absolute discretion they may deem to be for the benefit of the college, and then certain modes in which they may exercise their discretion are indicated. For instance, the repayment of the capital mortgages and the payment of pensions to headmasters or retiring allowances to any person who has held the office of warden, sub-warden, headmaster and so on. Now in my judgment neither the mortgagees nor the person to whom the allowances are made ever become cestui que trusts of the warden and council under this statute. The statute merely contains indications of what would come within the powers of the wardens and council when administering the funds for the benefit of the college, which is their sole cestui que trust. The payments there indicated are payments which they are authorized to make solely for the benefit of the college, and the persons administering those funds do not, by making those payments, constitute the persons to whom they make them their cestui que trusts under any supposed trust created by this statute in their favour. This distinction to my mind is a fundamental distinction between *Drummond* v. *Collins* (1) and the other cases decided on the same lines, and the present case.

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(1) [1915] A. C. 1011.

(2) 11 Tax Cas. 277.

For these reasons I agree that the appeal fails and ought to be dismissed.

ROMER L.J. I agree. The case on behalf of the Crown is put alternatively. They say, in the first place, that this annual allowance is taxable under Sch. E as being a payment made in respect of the office formerly held by the respondent as headmaster of Bradfield College. In the alternative they say that it is an annuity or other annual profit or gain, such as is mentioned in cl. 1 (*b*) of Sch. D, which was formerly chargeable under that Schedule, but is now chargeable under Sch. E, by virtue of the provisions of s. 18 of the Finance Act, 1922.

In my opinion the Crown is wrong on both points. This annual allowance was not one that was stipulated for by the respondent at the time when he undertook the office of headmaster; nor was it one to which, as the holder of that office, he had any right or title; it was an allowance made to him by the governing body of the college when he gave up his office, and I share the difficulty that was felt by Lord Dunedin in the case to which our attention was called of *Duncan's Executors* v. *Farmer* (2), in seeing how it is possible to say this payment is made in respect of the respondent's office, when the whole reason the allowance was given to him was that he was no longer in that office. I do not think, on the other hand, that it is an annuity or other annual profit such as is mentioned in Sch. D. The question whether it is or is not seems to turn on this, whether it is to be regarded as an annual payment to which the respondent has a right, or whether it is to be regarded merely as a series of annual gifts made to him by the governing body of the college? I think it must be conceded that it is to be regarded as a series of voluntary gifts made to him, unless the case can be brought within the principle that was applied in *Drummond* v. *Collins*. (1) In that case there was a will by

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(1) [1915] A. C. 1011.

(2) 5 Tax Cas. 417.

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virtue of which the trustees owed a duty to certain children to make provision from time to time out of the income of the share of those children in the trust estate for the suitable maintenance and education of such children, but the amount so to be applied from time to time was to be such as the trustees in their uncontrolled discretion might think necessary or advisable. The trustees in the exercise of their discretion did apply certain income, or rather, send over to this country from America, where they were, certain income for the purpose of being applied in that manner, that is to say, for the maintenance and education of such children, and the question arose as to whether that was to be treated as income of the children and so liable to taxation. Lord Parker in his judgment said (1): Though the infants "might be incapable because of their age of giving a receipt for the money, it is in my opinion none the less clear that the money in question was, as soon as the trustees had exercised their discretionary trust, held in trust for these infants as beneficiaries." Lord Wrenbury said (2): "But so soon as their" —that is the trustees'—"discretion is exercised in favour of the child the resulting payment seems to me upon the language of the will to be a payment of income to which the child is entitled by virtue of the gift made by the testator." So that the income was there held to be the income of the infants liable to taxation, because, to use the words of Lord Parker, "the money . . . . was . . . . held in trust for these infants as beneficiaries," or, to use the words of Lord Wrenbury, the child was entitled to the income.

In the present case the respondent, Mr. Beloe, was not entitled to this pension at all, nor was any part of the funds in the hands of the governing body held upon trust for him. When one looks at Statute No. 25, the statute referred to in the Charter, it will be seen that the surplus income was to be held upon trust for the benefit of the college to be applied for the benefit of the college in such way as the trustees—that is the warden and council—may in their absolute discretion deem to be most for its benefit. If there be any

(1) [1915] A. C. 1018.

(2) [1915] A. C. 1020.

cestui que trust under that it is the college and no one else. If the statute had stopped there, as it well might have done —because the subsequent words neither enlarge nor diminish the discretion which is given to the warden and council— it would have been impossible, I think, for Mr. Hills to argue that when the trustees in the exercise of their discretion applied a part of the income in making this allowance to Mr. Beloe because—this is the only reason they could make it—they considered that payment to be for the benefit of the college, that Mr. Beloe was a cestui que trust of theirs or became entitled to the pension, or that anything was held in trust for him. Certain words are added merely for the purpose of indicating to the trustees one or two ways in which they may think it desirable to benefit the college. One of these ways, as pointed out by Lawrence L.J., was to apply the money in payment of interest on or the repayment of capital of mortgages. If, in the exercise of their discretion, the trustees so applied part of the money no one could possibly say that a mortgagee was a cestui que trust of theirs, or that a mortgagee became entitled to receive any part of the trust money. It follows, in my opinion, that it is impossible in the circumstances for any one to say that Mr. Beloe was a cestui que trust of the warden and council, or that he had any right whatsoever to receive these sums which were from time to time paid to him.

For these reasons it appears to me that this appeal fails, and should be dismissed with the consequences which have been indicated by the Master of the Rolls.

Solicitor for Crown: *Solicitor of Inland Revenue.*

Solicitors for respondents: *Crossman, Block, Matthews & Crossman.*

W. I. C.

1931
June 10.

DAVIES (H.M. INSPECTOR OF TAXES) *v.* BRAITHWAITE.

Revenue—Income Tax—Actress—Series of Engagements—"Employment"—Profession or Vocation—Sch. D or Sch. E—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Schs. D and E—Finance Act*, 1922 (12 & 13 *Geo.* 5, *c.* 17), *s.* 18, *sub-s.* 1.

The expression "employment" in Sch. E of the Income Tax Act, 1918, means something analogous to an office or a post.

An actress earned her living by accepting and fulfilling engagements for which her professional qualifications fitted her. During the periods of assessment in question, she exercised her activities by (*a*) acting in various stage plays in England and one in the United States of America, under various contracts with theatrical producers; (*b*) performing for the films; (*c*) performing on the wireless for the British Broadcasting Corporation, and (*d*) performing for gramophone companies for reproduction on their records:—

Held, that the actress was assessable under Sch. D of the Income Tax Act, 1918, in respect of the profits which she derived from her profession or vocation as an actress and not under Sch. E in respect of the profits of her employment.

CASE stated under s. 149 of the Income Tax Act, 1918, by the Commissioners for the General Purposes of the Income Tax for the Kensington Division.

The respondent Miss Lilian Braithwaite, appealed against the following assessments made on her:—

(1.) Under Sch. D of the Income Tax Acts in respect of the profits from her profession or vocation as an actress:

For the year ended April 5, 1926 . .	979*l.*
„ „ „ „ 1927 . .	1293*l.*
„ „ „ „ 1928 . .	772*l.*

(2.) Under Sch. E of the Income Tax Acts in respect of the profits of her employment as an actress:

For the year ended April 5, 1926 . .	1232*l.*
„ „ „ „ 1927 . .	2000*l.*
„ „ „ „ 1928 . .	2000*l.*

The above Sch. D (1) and Sch. E (2) assessments were not intended to be cumulative, but were raised as alternative assessments in view of a dispute that had arisen between the parties with regard to the correct method of assessment.

The respondent, who resided in England, was an actress and earned her living by exercising her activities in any way that her professional qualifications fitted her for. During the three years ended April 5, 1928, she carried on her activities by (*a*) acting in various stage plays in England, and one in the United States of America; (*b*) performing for the films; (*c*) performing on the wireless for the British Broadcasting Corporation, and (*d*) giving performances for gramophone companies for reproduction on their records.

The General Commissioners had before them copies or forms of the following contracts under which the respondent performed during the three years in question: (*a*) December 12, 1924, engagement to appear in stage play, "The Vortex"; (*b*) May 18, 1926, engagement to appear in stage play, "What Might Happen"; (*c*) July 27, 1926, engagement to appear in stage play, "Caroline"; (*d*) May 23, 1927, engagement to appear in stage play, "The Silver Cord"; (*e*) November 4, 1927, engagement to appear for the British Broadcasting

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(1). Sch. D. 1. Tax under this Schedule shall be charged in respect of: (*a*) The annual profits or gains arising or accruing . . . . (ii.) to any person residing in the United Kingdom from any trade, profession, employment, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere; . . . .

2. Tax under this Schedule shall be charged under the following cases respectively; that is to say, ...

Case II. Tax in respect of any profession, employment, or vocation not contained in any other Schedule; . . . .

Finance Act, 1922, s. 18: 1. Such profits or gains arising or accruing to any person from an office, employment or pension as are, under the Income Tax Act, 1918, chargeable to income tax under Schedule D . . . . shall cease to be chargeable under that Schedule and shall be chargeable to tax under Schedule E . . . .

(2) Sch. E. Tax under Schedule E shall be charged in respect of every public office or employment of profit . . . .

Rules applicable to Sch. E:—

1. Tax under this Schedule shall be annually charged on every person having or exercising an office or employment of profit mentioned in this Schedule . . . . in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment, except as otherwise provided . . .

Corporation; (*f*) form of contract, undated, engagement to appear in film plays; (*g*) standard form of contract undated. Form used in the United States of America.

The respondent had also appeared for the British Broadcasting Corporation on other dates. She had also performed for gramophone companies for reproduction on their records.

The appeal to the General Commissioners against the Sch. D assessments was heard first. It was contended for the present respondent that: (*a*) the contracts between the theatrical producers and the respondent were contracts of employment, the relation between the producer and the respondent being that of master and servant. The case of *Performing Right Society, Ld.* v. *Mitchell and Booker* (*Palais de Danse*), *Ld.* (1) was referred to; (*b*) the respondent was not assessable under Sch. D in respect of any profession or vocation for any of the years in question, but was assessable only under Sch. E in respect of the various employments exercised by her; (*c*) as no remittances had been made to this country on account of the respondent's earnings in her employment outside the United Kingdom there was no liability under Case V. of Sch. D on the ground of such employment being a foreign possession.

For the Crown it was contended (inter alia) that (*a*) the respondent exercised a profession or vocation during the years in question and was assessable therefore under Case II. of Sch. D in respect of the whole of her profits, whether earned in this country or abroad; (*b*) the respondent exercising a profession or vocation, the forms of the various contracts by means of which she exercised it were immaterial; (*c*) the assessments were correct in principle and should be confirmed, subject to any necessary adjustments of figures.

The Commissioners were of opinion that the respondent was assessable for all the years in question under Sch. E and not under Sch. D, and they discharged the assessments under Sch. D.

The Crown appealed.

(1) [1924] 1 K. B. 762.

Immediately after giving their decision in the appeal against the Sch. D assessments, the General Commissioners heard Miss Braithwaite's appeal against the assessments under Sch. E.

The General Commissioners were of opinion that in assessing the respondent under Sch. E, the income received by her in respect of her American employments must be omitted and they confirmed the assessments with the omission of such income.

The Crown appealed.

When the appeals came on it was intimated to the Court on behalf of the Crown that it was desired to obtain the decision of the Court only on the question under which of the two Schedules—Sch. D or Sch. E—the respondent should be assessed.

Sir Stafford Cripps S.-G. and *R. P. Hills* for the Crown. The respondent ought to be assessed under Sch. D as following her profession of an actress. It is quite true that she was employed under various contracts, but she was nevertheless exercising her profession or vocation. All of her engagements involved the exercise by her of one set of talents throughout. It was because she was an actress, or an artiste, that she was employed under the various contracts referred to in this case. But all these contracts are different ways of exercising the talents which the respondent possesses. In fulfilling her engagements under such contracts the respondent is giving her own conception of the characters which she plays, and she is thereby exercising her profession or vocation. In 1922, Parliament took "employment" out of Sch. D and provided that profits or gains arising or accruing to any person from an employment should be chargeable under Sch. E: see Finance Act, 1922, s. 18, sub-s. 1. Rule 2 of the Rules applicable to Sch. E is not applicable to employments of the type in question in this case. Some of the contracts clearly cannot be regarded as creating the relation of master and servant. The contracts cannot be separated into two classes—namely: (1.) service contracts, and (2.) the exercise of a profession or vocation. The respondent must be either a servant in regular employment, or she must be exercising her profession or vocation. She cannot be partly one and partly the other and the type of work provided for in these contracts is more suitable for the exercise of a profession or vocation than for employment. The question of carrying on a "trade or business" within the meaning of s. 39 of the Finance (No. 2) Act, 1915, was discussed in *Burt & Co.* v. *Commissioners of Inland Revenue* (1); *Robbins* v. *Commissioners of Inland Revenue* (2); and *Radcliffe* v. *Inland Revenue Commissioners.* (3) The point is whether a person can be carrying on a business on his own behalf by carrying out contracts with different people. The carrying out of the contracts with successive masters may well be carrying on a profession or vocation. In no sense is it the exercising of an employment within the meaning of Sch. E. The respondent never was a servant in the sense of master and servant, but is a professional person carrying on her profession in the way in which her profession is carried on. With regard to the status of an actor and the obligation of theatrical producers who enter into a contract to engage an actor to act in a stage play to give the actor an opportunity of appearing in public, see *Herbert Clayton and Jack Waller, Ld.* v. *Oliver.* (4) The respondent carries on her profession by entering into these contracts and therefore she is assessable under Sch. D as a person carrying on a profession and not under Sch. E as a person in an employment, and if she is assessable under Sch. D, her earnings in the United States must be brought into charge.

R. W. Needham K.C. and *J. S. Scrimgeour* for the respondent. It is admitted that, in a colloquial sense, the respondent is carrying on a profession. But she is in fact an employee in relation to each one of these contracts, with the possible exception of the contract with the gramophone company. Once there is an "employment" within the meaning of the Income Tax Acts the respondent falls to be assessed under

(1) [1919] 2 K. B. 650.
(2) [1920] 2 K. B. 677.
(3) [1921] 90 L. J. (K. B.) 568.
(4) [1930] A. C. 209.

Sch. E. These are certainly contracts of employment. Sch. E embraces a very wide class. Looking at the bases of the contracts it is impossible to say that such contracts are not contracts of employment. In *Lumley* v. *Gye* (1) the question was specifically raised whether an actress was a servant and whether the relationship of master and servant subsisted. It was not necessary to decide the point in that case. In the present case the respondent is exercising certain employments under contracts, and she is assessable under Sch. E.

R. P. Hills replied.

ROWLATT J. The question of principle in this case is whether the respondent ought to be assessed under Sch. D of the Income Tax Act, 1918, as following her profession of an actress, or whether she ought to be assessed under Sch. E as exercising certain employments under the particular engagements which she makes. The question is a difficult one, mainly because of the want of precision in the meaning of the term " employment " as it comes into this controversy.

The scheme of the Income Tax Acts used to be to include under Sch. D " profession, employment, or vocation." That was held to be a fairly comprehensive definition of the persons who carried on business on their own account. Under Sch. E were public offices. It was recognized that where a person was in a permanent situation it was much better to assess his salary as the salary of the situation than to go to him personally, and assess him in respect of his earnings. There were persons, like railway clerks, who were hired for an indefinite period. For the purposes of assessment to income tax they were treated as holders of offices. That was a very convenient method of assessment to income tax. Then a case arose (*Great Western Ry. Co.* v. *Bater* (2)), in which I pointed out that these railway clerks were not holders of offices at all. I said that my own view was that Parliament in using this language in 1842 meant by an office a substantive thing that existed apart from its holder. It was something which had an existence independent of the person who filled it. It was something which was held by tenure and title rather than by contract and which continued to exist, though the holders of it might change and it was filled in succession by successive holders. The House of Lords decided that my view was right. (1) It was therefore found convenient to put " employment " expressly in Sch. E. (2)

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(1) (1853) 2 E. & B. 216.

(2) [1920] 3 K. B. 266.

When the word " employment " is used in connection with a profession or vocation in Sch. D it means the way in which a man employs himself. But " employment " in Sch. E means something different. In that Schedule it means something analogous to an office and which is conveniently amenable to the scheme of taxation which is applied to offices as opposed to the earnings of a man who follows a profession or vocation.

That unhappy word " employment " has now to be construed with reference to this case. The respondent is an actress, and, of course, the contract which an actor or actress, or any person whose livelihood is earned in that sort of way, has, is rather different from other contracts, as has been pointed out, because it involves that the employer under the contract is bound to let the actor or actress appear. But what is the criterion ? The Solicitor-General has said a good deal with regard to the degree of skill and attainment which is required of a lady who is in a position to enter into agreements of this kind. I do not think that the question turns on the degree of skill at all. It seems to me that the most skilful and distinguished persons, whose qualifications are very rare in art or medicine, or any other profession where distinction is difficult to obtain, may well enter an " employment," and, if they take a situation for years and made it their life occupation, it would be no answer to a claim to assess them under Sch. E to say that they are very skilled and distinguished persons, because such very skilled and distinguished persons would be exercising an " employment " in the sense of Sch. E as much as anybody else who holds

(1) [1922] 2 A. C. 1.

(2) See Finance Act, 1922, s. 18, sub-s. 1; note (1) p. 629 above.

an office. On the other hand, if a very humble person takes a series of jobs for an hour or so each, he would be carrying on a trade. Nor is the mere duration of the engagement the criterion. An actress may make a contract for the run of a play, which might be a considerable time, but it would not necessarily thereby become "employment" within Sch. E.

It seems to me quite clear that a man can have both an employment and a profession at the same time, in different categories. A man may have the steadiest employment in the world by day and he may do something quite different in the evening and make some more money by the exercise of a profession or vocation. I cannot doubt that that would be so, and even if it were in the same sphere, I do not see why he should not have both an employment as well as a profession. For instance, a musician who holds an office or employment under a permanent engagement can at the same time follow his profession privately.

I have to formulate some line of cleavage and it seems to me that what I must glean my inspiration from is the purpose of the change from Sch. D to Sch. E in the Finance Act, 1922, s. 18. I have to consider the effect of the change which was made in the different methods of raising income tax. It seems to me that when the Legislature took "employment" out of Sch. D, and put it into Sch. E, alongside "Offices," the Legislature had in mind employments which were something like offices, and I thought of the expression "posts" as conveying the idea required. When a person occupies a post resting on a contract, and if then that is employment as opposed to a mere engagement in the course of carrying on a profession, I do not think that is a very difficult term of distinction, though perhaps a little difficult to apply to all cases. But I would go further than that and say that it seems to me that where one finds a method of earning a livelihood which does not consist of the obtaining of a post and staying in it, but consists of a series of engagements and moving from one to the other—and in the case of an actor's or actress's life it certainly involves going from one to the other and not going on playing one part for the rest of his or her life, but in obtaining first one engagement, then another, and a whole series of them—then each of those engagements cannot be considered an employment, but is a mere engagement in the course of exercising a profession, and every profession and every trade does involve the making of successive engagements and successive contracts and, in one sense of the word, employments.

In this case I think it is quite clear that the respondent must be assessed to income tax under Sch. D, because here she does not make a contract with a producer for a post. She makes a contract with a producer for the next thing that she is going to do, and then with another producer, and then a third producer, and at any time she may make a record for a gramophone company or act for a film. I think that whatever she does and whatever contracts she makes are nothing but incidents in the conduct of her professional career. Therefore, I think she is taxable under Sch. D.

With regard to the question whether the respondent's American earnings ought to be included in the assessment, I am not in a position to decide that, because I have no decision on it from the Commissioners. But the point was raised because it was contended on her behalf on the appeal to the General Commissioners against the Sch. D assessments that, as no remittances had been made to this country, she could not be assessed under Case V. of Sch. D. I shall allow this appeal, but I shall send the case back to the Commissioners, at Miss Braithwaite's option, to have a decision by them on the question whether her American earnings ought to be included in the assessment under Sch. D.

Appeal allowed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for the respondent: *Theodore Goddard & Co.*

T. W. M.

WARD *v.* BRITISH OAK INSURANCE COMPANY, LIMITED. (1)

1931
June 17.

[1931. W. 887.]

Insurance—Third Party Risks—Liquidation of Company Insured—Statute not retrospective—Third Parties (*Rights Against Insurers*) *Act*, 1930 (20 *and* 21 *Geo.* 5, *c.* 25), *s.* 1.

The Third Parties (Rights Against Insurers) Act, 1930 (20 & 21 Geo. 5, c. 25), s. 1, sub-s. 1, provides that: "Where under any contract of insurance a person (hereinafter referred to as the insured) is insured against liabilities to third parties which he may incur, then (*a*) in the event of the insured becoming bankrupt or making a composition or arrangement with his creditors; or (*b*) in the case of the insured being a company, in the event of a winding-up order being made, or a resolution for a voluntary winding-up being passed, with respect to the company . . . . if, either before or after that event, any such liability as aforesaid is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any Act or rule of law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred":—

Held, that this section was not retrospective so as to affect cases in which the liability had been incurred before July 10, 1930, when the Act came into operation.

Action tried by Charles J. without a jury.

On November 17, 1927, the plaintiff was injured by a motor lorry owned by James Clerk, Ld., and driven by their servant, one George Dowd. On February 22, 1928, he issued a writ in the High Court claiming damages for negligence against James Clerk, Ld. (hereinafter referred to as "the company"), and Dowd. This action was remitted to the Edmonton County Court, and on May 8, 1929, as a result of the trial, judgment was entered for the plaintiff in that Court for 100*l.* and costs.

The company was at all material times insured with the defendants against liability for compensation for bodily injury caused by their vehicles to third persons. On December 27, 1927, a resolution was passed for the voluntary winding-up of the company, and a liquidator was appointed. The liquidation was completed, but the liquidator took no steps to obtain payment from the defendants under the policy of insurance. The plaintiff, who sued as a poor person, now claimed to recover 154*l.* in all, the amount of the judgment and costs, from the defendants under the policy by virtue of the Third Parties (Rights against Insurers) Act, 1930.

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(1) Affirmed in C. A., October 21, 1931.

Percy Lamb for the plaintiff. It is not necessary to show that the statute is retrospective in its operation; for the plaintiff's rights were in being when it was passed. Here, however, the statute was retrospective, because it was passed to remedy an existing evil and to create a new right. In such cases there is a right to the new remedy, even without express words in the statute, and the statute becomes retrospective in its operation: *Lane* v. *Lane* (1) following *Reg.* v. *Birwistle* (2), This has been held to be the case in various Acts, for instance, in the Married Women (Maintenance in Cases of Desertion) Act, 1886, there were no express words making the Act retrospective, and yet it was so held in *Reg.* v. *Birwistle* (2), Lord Coleridge C.J. observing in argument, "Scores of Acts are retrospective, and may without express words be taken to be retrospective since they are passed to supply a cure to an existing evil." It was held in *In re Lees* (3) that the Solicitors Act, 1843, even without express words, was retrospective as to bills previously taxable, and this case was followed in *In re Eyre.* (4)

Ernest Hancock for the defendants. The Act of 1930 was intended to remedy the position which existed before the Act, and which was illustrated in *In re Harrington Motor Co., Ld. Ex parte Chaplin.* (5) Before 1930 the bankruptcy of the assured might deprive the judgment creditor of his rights to the insurance money, which then went to the trustee for the general body of creditors. The transfer of rights to the plaintiff under s. 1, sub-s. 1, of the Act of 1930, takes place on the incurring of the liability or at the commencement of the winding-up, whichever is later in time. The Act only applies where either the accident or the winding-up took place after July 10, 1930, when it came into force. The other

(1) [1896] P. 133.
(2) (1889) 58 L. J. (M. C.) 158.
(3) (1844) 5 Beav. 410.
(4) (1848) 2 Ph. 367.
(5) [1928] Ch. 105.

statutes, cited as being retrospective, did not interfere with existing rights, and the Solicitors Act, 1843, only affected procedure. The words in the present statute raise a presumption that the Act was not intended to be retrospective. Very clear words are required in an Act of Parliament to revive or recreate an expired right: *Lauri* v. *Renad* (1), per Lindley L.J. referred to by Maugham J. in *Gardner & Co.* v. *Cone.* (2)

CHARLES J. [after stating the above facts, continued:] In these circumstances the plaintiff sues in reliance upon the Third Parties (Rights against Insurers) Act, 1930, s. 1, sub-s. 1 (*b*). [His Lordship read the section and continued]: For the defendants it is said that the section cannot be applied here unless the Act is held to be retrospective, and in my view that contention is right. The point is interesting and without authority. I am guided by a general consideration of the law applicable to retrospection. That law has been frequently dealt with and the general principle was laid down by Lindley L.J. in *Lauri* v. *Renad* (1) in a judgment in which Bowen L.J. concurred, as follows: "It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction; and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary." That statement of the law has been repeated in other cases, and was relied upon by Maugham J. in *Gardner & Co.* v. *Cone* (2), who elaborates it thus:—"An Act may be called retrospective because it affects existing contracts as from the date of its coming into operation; and this section is an instance of that. It may be more properly described as retrospective, because it applies to actual transactions which have been completed, or to rights and remedies which have already accrued." It is said that in other Acts, such as the Solicitors Act, 1843, words which

(1) [1892] 3 Ch. 402, 420, 421.

(2) [1928] Ch. 955, 966.

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Charles J.

were not clearly retrospective were so held, although the Act created a new remedy and affected existing rights: *In re Lees* (1) and *In re Eyre.* (2) But when those Acts are examined one finds words which really connote retrospection. The question here is whether the words of this Act, without being strained, can be said to connote retrospection, or whether the Act is only prospective. Sect. 1 refers to a person insured against liabilities "which he may incur." It does not say liabilities "which he has incurred," as would be said if retrospection were intended. Again, if the insured is a company, then "in the event of a winding-up order being made" certain results follow: the statute does not say "in the event of a winding-up order having been made." Again, "if any such liability is incurred by the insured, his rights . . . . shall be transferred to and vest in the third party": the section does not say, "If any liability *has been* incurred, his rights shall be deemed to be transferred," or similar words importing retrospection. I can find nothing in this section to indicate that it is retrospective in its operation, and I think that the plaintiff cannot succeed unless the Act is held to be retrospective. Before this Act was passed, upon the authority of *In re Harrington Motor Co., Ld. Ex parte Chaplin* (3) the insurance money would form part of the assets of the company and be used for distribution among the general body of creditors. If the liquidator so desired it would seem that he could claim an indemnity from the defendants for money paid as damages to the plaintiff. But as he has not done so, there is no liability on the defendants, and I must give judgment in their favour.

Judgment for defendants.

Solicitors for plaintiff: *Dennes, Lamb & Drysdale.*
Solicitors for defendants: *Munton, Morris, King & Co.*

(1) 5 Beav. 410. (2) 2 Ph. 367.
(3) [1928] Ch. 105.

F. P. F.

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